

Submission to the Murray-Darling Basin Authority in response
to

Review of the Operation of the *Water Act 2007* (Cth)

prepared by Environmental Justice Australia

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Submitted to:

Independent Reviewer, by way of DCCEEW, wateractreview@dcceew.gov.au

Introduction

1. Environmental Justice Australia is a public interest legal practice, based in Melbourne but undertaking work around Australia. EJA was formerly the Environment Defenders Office Victoria until 2014. EJA is a community legal centre, specialising in environmental law, natural resources management law, water law and related fields. We act on behalf of community and public interest clients, as well as engaging in public advocacy in issues relevant to our expertise and specialisations.
2. EJA has long been engaged actively in law and policy as it relates to the Murray Darling Basin, from passage of the Water Act and preparation of the Basin Plan to the present day. We have and continue to work collaboratively and closely, as circumstances permit, with environmental groups and NGOs, scientists, Aboriginal organisations, academics, and other legal practices on issues and concerns relating to the Murray Darling Basin.
3. We refer the Reviewer to EJA's submissions to the Basin Plan Review in addition to our submissions below.
4. In addition to our extended submissions contained in the body of this document, we add a summary response to each specific section 3 legislative object in the Appendix.

Key facts and propositions

5. For the purposes of informing our submissions below, we set out here key facts and propositions as they relate or are relevant to the principal subject-matter of the Review, including but not limited to the operation of the *Water Act 2007* (Cth) ('the Act'), whether the objects of the Act have been achieved and opportunities to promote UNDRIP principles.
6. This (re)statement of key facts and propositions is not intended to be exhaustive of those relied on or identified in these submissions. The statement reprises certain matters raised in EJA's submissions on the Basin Plan Review. We note that the Reviewer will be considering the contents of the latter submissions as relevant in any case.
7. The Act is principally a law for the management of water resources, geographically confined to the Murray-Darling Basin ('MDB') (although with national features, such as those concerning water information), and by which water resources are defined in a broad sense, including ecologically, hydrologically and geomorphologically, as they relate to surface and groundwater and to environmental features in the landscape. This ecological characterization of water resources (or 'Basin water resources') is to be understood and interpreted also in connection with key international environmental treaties informing and validating the law, such as the Ramsar Convention,¹ the Biodiversity Convention² and the UN Framework

¹ *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* (1971), [Microsoft Word - current convention text e.docx](#)

² *Convention on Biological Diversity* (1992), [Home | Convention on Biological Diversity](#)

Convention on Climate Change,³ to each of which Australia is a part. Notwithstanding the various constitutional bases on which the Act relies for validity, it is Parliament's power to legislate for external affairs (as such, implementing key environmental treaties), as well as in the national interest (in exercise of the implied nationhood power), that are particularly important sources of constitutional validity and legitimacy to the Act.

8. A pivotal device of the Act, the setting of a SDL(s) reflecting an ESLT, is fundamentally a device of environmental management of Basin water resources, subject to which social and economic considerations are to be optimized. The main mischief to which the Act is directed is overextraction of water resources of the MDB causing environmental harm and degradation. The Act may additionally be characterized as a law for environmental protection and restoration of water ecosystems across the MDB. In these respects, if environmental restoration may be conceived as a form of 'ordered and principled experimentation'⁴ in environmental repair, it may be said that the century of overextraction of Basin water resources was equally an environmental experimentation, with increasingly dire and disorderly consequences.
9. The Act has properly been described as world-leading,⁵ a proposition that is supported by observations as to the legal effect of the environmental-restorative standards contained in it, the comprehensive transboundary (Basin-wide) character of water management and use, the integrated legal and institutional architecture of that management and use, and the clear foundational role of international law at the base of that architecture. A policy cornerstone of the Act is the shift of the centre of governance and management of Basin water resources from interjurisdictional politics – especially between upstream extractive States (above all NSW, Victoria and Queensland) and downstream consequences in SA – to law and science. Inevitably, politics is not removed from scheme, but the plain intention of the Act is to put water management on a more desirable, rational, transparent and ultimately sustainable footing in the national interest.

³ *United Nations Framework Convention on Climate Change* (1992), [United Nations Framework Convention on Climate Change | UNFCCC](#)

⁴ See SER *International Principles and Standards for the Practice of Ecological Restoration* (2019); Higgs et al 'On principles and standards in ecological restoration' (2018) 26 *Restoration Ecology* 3 399; See eg Zedler 'Ecological restoration: guidance from theory' 3 *San Francisco Estuary and Watershed Science* 2; Palmer et al 'Ecological theory and restoration ecology' in Falk et al (eds) *Foundations in Restoration Ecology* (Island Press, 2006); cf Walker *Final Report of the Royal Commission into the Murray Darling Basin* (2019) ('Walker 2019'), 150: 'The ESLT is an objective, not a permanent setting. Its determination for each specified water resource in the Basin Plan is therefore a matter of experimentation, subject to testing against ecological responses, condition changes and new information over time. The Water Act envisages this, and that changes to ESLTs and SDLs will be made.'

⁵ Walker 2019, 17; see also Carmody 'The unwinding of water reform in the Murray-Darling Basin: a cautionary tale for transboundary water system' in Holley and Sinclair (eds) *Reforming Water Law and Governance: From Stagnation to Innovation in Australia* (Springer, 2018), 38: 'All this despite—or possibly because of—the fact that the Act is one of the most rigorous pieces of environmental legislation in Australia. This rigour is largely due to the constitutional underpinnings of the statute. Specifically, the Act derives the majority of its constitutional validity from a suite of environmental treaties to which Australia is signatory...'

10. The above propositions are broadly consonant with findings and opinions of the *Final Report of the SA Royal Commission into the Murray Darling Basin*, a study into the subject-matter and implementation of the Act that remains compelling, largely unparalleled, and, in our view, legally correct. The Commonwealth's continuing failure to engage with the *Final Report* in any serious way tarnishes the proper administration and the good reputation of the Commonwealth. The Independent Review should engage directly, seriously and productively with the *Final Report*, its findings and recommendations.
11. The setting of the SDL(s) for the MDB in the *Basin Plan 2012* (Cth) did not and does not reflect an ESLT in accordance with the Act and in this respect this key operational expression of the Act (as administered by the Authority and the Minister) is likely unlawful and until rectified will continue to be so. This fact infects the legality of cascading mechanisms established under the Act, such as water resource plans and the sustainable diversion limit adjustment mechanism. These conclusions are set out at length in the SA Royal Commission *Final Report* and we continue to adopt the findings and analysis of the *Final Report* in those respects.
12. The Act is typical of a law for a form of what has been termed 'environmental federalism',⁶ or in other words a Commonwealth law providing for a national role and function of the Commonwealth in the administration of water resources,⁷ broadly aligning with what has been termed 'cooperative federalism'.⁸ The Act provides not only for a scheme of Commonwealth involvement and intervention in the management of Basin water resources but Commonwealth *leadership* and the key institutions and governmental machinery to do so, such as the Authority, the Commonwealth Environmental Water Holder ('CEWH') and the Special Account, the Minister, the Basin Officials Committee ('BOC'), and the Inspector-General for Water Compliance ('IGWC'). The content of this leadership is strongly, if not preponderantly, environmental. In our submission, the Commonwealth's function is properly to be the 'rising tide that lifts all [State] boats.' The Act may be characterized, in key ways, as a framework law – a law establishing the legal, policy and institutional architecture for use and management of Basin water resources – in which laws and institutions of Basin States have a subsidiary, albeit significant, role. As we discuss further below, the precise role of the Commonwealth and the proper legal bases of that role are key matters of consideration for the Independent Reviewer.
13. The information base for the operation of the Act includes extensive science, knowledge and information generated, collated and organized by Basin States as well as the Commonwealth, which (as far as it concerns the Authority and the Minister) is governed by the obligation to act on the basis of best available scientific knowledge and socio-economic analysis. Departure from that legal standard, as well as practical concerns with public availability of key information (such as in hydrological modelling), has been notorious and problematic,

⁶ ⁶ See eg Fowler *Environmental Governance* (Australian Panel of Experts in Environmental Law, Technical Paper 2, 2017), [APEEL-Technical-Papers-1-8-Compilation.pdf](#)

⁷ Broadly understood and including ecological and geophysical factors: see *Water Act 2007* (Cth), s 4 ('water resources')

⁸ See also below at [78]-[83].

given the fundamental role of the scientific and information base in planning and decision-making. Governance of water information, broadly understood, requires serious attention in order that this basic component of the management and use of Basin water resources is fit for purpose (of probative value for, and reasonably appropriate and adapted to, those tasks). While reliance on hydrological models is necessary and integral to management of the MDB, it is not, of itself, sufficient and cannot displace observed or ‘ground-truthed’ information obtained through robust, aligned and well-designed monitoring and reporting programs. Any such exclusive reliance is apt to contribute to legal error as well as poor or inexplicable management outcomes.

14. The actual environmental conditions of the MDB remain deeply concerning, continuing to exhibit long-term trajectories of decline, failure to meet indicia of ecological recovery, and evidencing diminishing resilience in the face of climate change.⁹ Within the general picture, there are positive elements and considerations, such as maintenance of in-channel flow regimes in the southern MDB including longitudinal connections to the Coorong and Lower Lakes. Gravely, the actual fate and conditions of the MDB nearly a decade and half after the Basin Plan coming into effect are illustrated in the listing of the ecological community of the River Murray from the Darling River to the Sea as ‘critical endangered’¹⁰ and the Macquarie Marshes as endangered¹¹ in early 2026. Flow-ecology relationships, essential to MDB ecosystems and by extension to achievement of the objects of the Act, such as fundamentally expressed in connectivities (longitudinal, lateral and vertical), plainly remain compromised. That fact is even accepted in large part by the Authority in its Basin Plan Review Discussion Paper.
15. Actual environmental conditions in part reflect flawed administration of the Act, which has included the failure to determine and give effect to a lawful SDL (as noted above) and which, combined with the design and implementation of the SDL Adjustment Mechanism (‘SDLAM’), has produced what has been described as a ‘step down’¹² (or ‘unwinding’¹³) in required return of water to the environment. The immense offset ‘experiment’¹⁴ contained in the SDLAM was evidently in real trouble by the early 2020s and has broadly failed by 2026, with around half of purported equivalent water recovery (environmentally-beneficial) outcomes not to be delivered by way of notified SDLAM projects.

⁹ See eg our summary of scientific literature in EJA’s submissions on the Basin Plan Review at [67]

¹⁰ DCCEEW ‘River Murray downstream of the Darling River, and associated aquatic and floodplain ecosystems’, SPRAT database, [River Murray downstream of the Darling River, and associated aquatic and floodplain systems](#)

¹¹ DCCEEW ‘Wetlands and floodplains of the Macquarie Marshes’ SPRAT database, [Wetlands and inner floodplains of the Macquarie Marshes](#)

¹² Colloff and Pittock ‘Mind the Gap! Reconciling Environmental Water Requirements with Scarcity in the Murray–Darling Basin, Australia’ (2022) 14 *Water* 208

¹³ Carmody ‘The unwinding of water reform in the Murray–Darling Basin: a cautionary tale for transboundary water system’ in Holley and Sinclair (eds) *Reforming Water Law and Governance: From Stagnation to Innovation in Australia* (Springer, 2018)

¹⁴ Walker 2019, 57

16. Expression and promotion of Indigenous¹⁵ rights and interests have, in the real and practical administration of Basin water resources, been a marginal concern, which is a situation increasingly intolerable in the context of continued assertion by Aboriginal peoples of their rights and interests across the Basin, developments in indigenous law and policy nationally and internationally, and mere consistency of Basin water resources management with the content of key international instruments. In any material sense, the present legal scheme for recognition and protection of Aboriginal rights and interests (contained in certain objects and in the scheme of Chapter 10 Part 14 of the Basin Plan) is largely ineffectual. That is so in its terms (there being no statutory obligation effecting Aboriginal peoples' power or influence over Basin water resources outcomes), as well as in implementation.¹⁶ Aboriginal participation in the water market, via water holdings or otherwise, is almost non-existent, despite the fact that where such holdings are exercised in their favor – and in accordance with genuine agency – outcomes may be notable and impressive.¹⁷ Those features of water reform giving rise to a large-scale water market, such as unbundling of water rights and establishment of NWI-style entitlements, have at best ignored and more candidly been to the detriment of Aboriginal peoples in the Basin, who have gained little or no water 'security' through the process, the 'security' of others entrenching marginalization from decision-making over this fundamental element of cultural, social and indeed physical life.¹⁸
17. Prominence has ordinarily been given to constitutional bases of the Act as lying in particular in implementation of the Ramsar Convention and the Biodiversity Convention, among the 'relevant international agreements' underpinning validity. While that is correctly the case and fundamental, we note additionally the significance and role of Australia's obligations under international law governing climate change (including the UNFCCC, subsequent agreements, and obligations as set out in the ICJ's *Advisory Opinion on the Obligations of States in respect of Climate Change*). In this respect, the nexus between climate change and Basin water resources is not merely one of factual impacts (or projected impacts) on those resources by climate change – or more accurately, dangerous anthropogenic interference in the climate system – but moreover the contribution of protection and recovery of Basin water resources (water ecosystems) to Australia's obligations to protect the *climate system* from significant harm.¹⁹ Protection and recovery of Basin water resources is directly relevant

¹⁵ Termed variously in these submissions as 'Aboriginal' or 'First Nations' as appropriate in the circumstances

¹⁶ For example, the previous and continuing reliance by the Authority on Position Statement 1B as its opinion as to due 'regard' to Indigenous outcomes, objectives, value or uses was fairly described by Commissioner Walker as 'discriminatory' and 'disrespectful', or what might be described as a barely described tokenism: see Walker 2019, 487.

¹⁷ See eg Fitzsimons et al 'Establishing large, permanent protection outcomes on an Indigenous-owned private land: innovations at Gayini, Australia' (2025) 7 *Conservation Science and Practice* e70055, DOI:10.1111/csp2.70055; Woods et al 'Water and land justice for indigenous communities in the Lowbidgee floodplain of the Murray-Darling Basin, Australia' (2020) *International Journal of Water Resources Development*, <https://doi.org/10.1080/07900627.2020.1867520>

¹⁸ See Hartwig et al 'Water colonialism and indigenous water justice in south-eastern Australia' (2022) 38 *International Journal of Water Resources Development* 1 30

¹⁹ See eg Della Bosca and Gillespie 'Bringing the swamp in from the periphery: Australian wetlands as sites of climate resilience and political agency' (2020) 63 *Journal of Environmental Planning and Management* 9 1616. The authors call for 'wetlands and their governance' to be reframed as 'politically active agents of climate

to these obligations as those resources are, in law and fact, part of the ‘climate system’ (for example, part of the constituent hydrosphere and biosphere of the climate system and in the Australian context a significant component). In point of fact, degradation, continued risk of decline or failure to repair Basin water resources, as the Act contemplates, is contrary to and impairs Australia’s performance of its climate obligations. Diminution of the Act and/or failure to redress its poor implementation is itself a climate risk.

Foundations of the Act: SDLs and ESLT

18. The integrity of the scheme of the Water Act relies in substantial part on a core concept imported from *Intergovernmental Agreement on the National Water Initiative* of 2004, being the environmentally sustainable level of extraction, including the return of overallocated and overused water systems to an environmentally sustainable level of take (‘ESLT’).²⁰ The sustainable diversion limit (‘SDL’) mechanism is based on a scientifically-determined and -justified ESLT. The issue of legality concerning the setting of SDLs has been ventilated elsewhere and we do not proposed to reprise the issue here.
19. ESLT and corresponding SDLs are a design feature of the Act basic to integrating the domestic law and international environmental treaties on which it relies, including through the *grundnorm* of ‘sustainability’.²¹
20. In our strong submission, the cornerstone of the ESLT/SDL mechanism must be retained in the Act in its present form at subsection 23 and in accompanying section 4 definitions. In particular, the non-compromise principle contained in the definition of ‘environmentally sustainable level of take’ must be retained. The concept of an SDL reflecting an ESLT sets a foundational volumetric parameter intrinsically linked to a scheme of environmental values measurable in the world and ‘reasonably appropriate and adapted’ to Australia’s relevant international environmental obligations.
21. Volumetric measures have limitations (such as being to some degree abstract or generalized in character) but also precise, measurable, targeted, explicable and consistent with the manner of water regulation and use generally. Volumetric limits are consistent with a model of water governance emphasizing *control on take*, an approach essential to meeting the nature of the problem (which is overextraction or take compromising environmental values). Inherently the SDL/ESLT mechanism is constraining – it limits extraction in order to avoid compromise to Basin water resources – rather than positive (in the legal sense). There is nonetheless flexibility in how SDLs are set formally.²²
22. Requirements for environmental water management and strategies are essential to achievement of positive outcomes and achieving the task of recovery and restoration of

resilience’ (at 1627). See also Colloff et al ‘Adaptation services of floodplains and other wetlands under transformational climate change’ (2016) 26 *Ecological Applications* 4 1003.

²⁰ *Intergovernment Agreement on a National Water Initiative* (2004), cl 23(iv), the term ‘extraction’ being used in the NWI and ‘take’ in the Act. We proceed on the basis here that they mean the same thing.

²¹ See *Convention on Biological Diversity*, Art 2 (‘sustainable use’); also Walker 2019, 137-142

²² *Water Act 2007* (Cth), subs 23(2); see also Walker 2019, 143-144

Basin water resources, although these devices are *part of the statutory scheme as a whole* not the foundational concepts of the Act.

23. To the extent it would be valuable and appropriate to give the statutory concepts of ESLT/SDL positive expression, or in other words legal expression consistent with active terms additional to the present construction of ‘environmentally sustainable level of take’ (as that level of take which would avoid compromise of the enumerated environmental values),²³ we submit that this approach could be included in legislative guidance in the drafting of section 23 of the Act and by way of reference to relevant international agreements. Such an approach may be linked to what has elsewhere been termed an ‘outcomes-based’ approach,²⁴ in effect supplementary to and expansive on the current form of ESLT/SDL. This is to say, the volumetric (quantitative) approach may be supplemented by further qualitative expression of the relevant environmental values adverted to in the terms of ‘environmentally sustainable level of take’. This approach is also to say a volumetric approach to use and management of Basins water resources is necessary, but arguably not sufficient, to operation of the Act.
24. Specifically, we suggest incorporation into section 23 a further subsection that includes drafting to the following effect:
- a. Without limiting anything in subsections (1)-(3) of section 23 or Item 6 in subsection 22(1), a long-term annual sustainable diversion limit must have regard to the manner and way it contributes materially to Australia’s implementation of the Kunming-Montreal Global Biodiversity Framework in respect of Basin water resources and achievement, specifically Targets 2, 3, 4, 8 and 10 of that instrument. We would propose a note is included in the statutory text identifying the Framework is subsequent agreement adopted by the CoP of the CBD and identifying that Targets 2 and 3 are concerned with setting quantified (‘30x30’) targets for conservation and recovery of terrestrial, inland water, and marine and coastal ecosystems.
 - b. Without limiting anything in subsections (1)-(3) of section 23 or Item 6 in subsection 22(1), a long-term annual sustainable diversion limit must have regard to the manner and way it contributes materially to connectivity between Basin water resources, as well as Basin water resources as a whole and the water resources or particular parts of Basin water resources of each water resource plan area.²⁵

²³ On the avoidance of compromise and its legal construction, see Walker 2019, 147: ‘At a minimum, then, compromise should mean the infliction of, or unacceptable risk of, material damage. This is something that exists well before the extreme result of ‘irreversible damage’ that would overcome an ecosystem’s resilience ie its ability to recover... the avoidance of compromise must involve setting a SDL, by way of an ESLT, that has realistic prospects of adequately improving the position — not merely holding it in an admittedly degraded state.’

²⁴ See eg Samuels *Second Independent Review of the Environment Protection and Biodiversity Conservation Act* (2021)

²⁵ Cf Dula t al Connectivity Expert Panel Final Report (2024); *Regulation (EU) 2024/1991 of the European Parliament and of the Council on Nature Restoration* (2024), Article 9 (‘Restoration of the natural connectivity of rivers and natural functions of the related floodplains’).

- c. Without limiting anything in subsections (1)-(3) of section 23 or Item 6 in subsection 22(1), a long-term annual sustainable diversion limit must have regard to the manner and way it contributes materially to implementation of any ecological character description or management plan for a Ramsar site prepared in accordance with the Australian Ramsar Management Principles and achievement of Australia's obligations under the Ramsar Convention as they relate to water resources within the Basin;
- d. Without limiting anything in subsections (1)-(3) of section 23 or Item 6 in subsection 22(1), a long-term annual sustainable diversion limit must have regard to the manner and way it contributes materially to the achievement of conservation objectives contained in any relevant recovery plan or conservation advice or like instrument made under Australian environmental law as they relate to Basin water resources.

Enhanced 'environmental federalism': water resource planning

25. There are a series of ways in which the achievement of the objects of the Act may be strengthened through greater exercise of leadership and effectiveness of the Commonwealth in respect of water resources management. We note that, as a starting point, the purpose of the Act itself (including as expressed in the objects of the Act) was to legislate for and strengthen Commonwealth leadership in respect of water resources management. The legal and constitutional basis for further strengthened Commonwealth leadership in this context is addressed in more detail below. Suffice it to say the question of the precise form and distribution of governmental powers and functions in relation to water resources is not necessarily self-evident, even in the context of Commonwealth constitutional restraint on legislative competence (including section 100). At this point, we would note that drawing an implication that the Commonwealth must take a position on water resources management substantially deferential to the States is not necessarily correct. In this vein, the proposition contained in the Discussion Paper that '[u]nder the Australian Constitution, primary responsibility for the management of water resources rests with state and territory governments...' should be treated some degree of circumspection. Certainly, the States and Territories possess the 'primary' function of governing *water access rights* and its consequences and certainly the Commonwealth has limited *express legislative competence* over water. However, the Commonwealth's *effective* legislative powers in respect of water are, actually and potentially, relatively broad where appropriate heads of power are engaged, the most relevant for our present purposes arguably being the external affairs powers, the implied nationhood power, and the power to legislate for Territories. These are all heads of power (among others) presently engaged to give the Act constitutional validity.
26. Strengthening and clarifying the leadership role of the Commonwealth in water resource planning will be necessary to achieving the objects of the Act. Evidence for this proposition lies in the protracted, difficult and delayed preparation of compliant WRPs by some Basin States. Additionally, much of the focus on achieving the object of the Act, including environmental outcomes, has in practice been on use of environmental water-holdings (held environmental water or HEW) with the role and function of water planning subsidiary or

obscured. In our view, that practical situation needs to be shifted and legal and policy setting adjusted accordingly, such as to give effect to water planning rules prioritizing or strengthening environmental water outcomes. The objects of the Act will not or are unlikely, in our submission, be met in the absence of strengthened water planning and greater, more directed Commonwealth involvement in that space.

27. Water resources plans are intended to be the localized expression and operation of the Basin Plan and the scheme of the Act. Their strengthening concerns aspects of legal form of water resource plans, their content and enforceability.

Strengthening water planning to achieve the objects of the Act, including environmental priorities

28. First, on the question of content it has been proposed that WRPs are ‘streamlined’, given their inherent complexity and breadth. To some degree that may be inevitable given the regulatory and factual conditions within a particular WRP area. As South Australia has suggested some content in WRPs could be contained in other guiding instruments, such as that concerned with assessment of risk.²⁶ Content that is largely or essentially informational need not necessarily be incorporated into WRPs, although WRPs should make provision for what information is required in operation of such plans, what standards should apply to information and technical inputs, and how information and technical opinion to be applied in practice.²⁷
29. Whether or how WRPs are ‘streamlined’ a key issue to be addressed in reform is the function and role of WRPs in setting planning rules, directions or standards for use and management of Basin water resources. For any statutory planning instrument, rule- and standard setting are typically fundamental qualities. In environmental and other contexts,²⁸ rule- or standard-like qualities lend protective effect to the law. Greater or more precise scope for protective rules contained in WRPs would tend to strengthen and update existing provisions applying to planned environmental water, such as assurance of ‘no net reduction in protection for planned environmental water’ as compared to the situation preceding the Basin Plan.²⁹
30. We submit that any overhaul of WRP provisions in the Act must address the need for and include express provision for measures such as (but not limited to):³⁰

²⁶ South Australia *South Australian Government Submission to the Murray-Darling Basin Authority’s 2026 Basin Plan Review* (2026), 107-109

²⁷ For example, a requirement that hydrological models and datasets on which the making of WRPs relies are provided to the Authority in a timely manner, are publicly available and verifiable, and which are based on best available science the MDBA can be reasonably satisfied is capable of informing the design and operation of WRPs.

²⁸ For example, human rights or laws for the benefit of Aboriginal rights and interests, each of which are relevant to Basin water resources management.

²⁹ *Water Act 2007* (Cth), subs 21(5)

³⁰ On a program of measures to be included in WRPs, see Wentworth Group of Concerned Scientists *Blueprint for the Next Murray-Darling Basin Plan* (2026), [Blueprint for the next Murray – Darling Basin Plan](#)

- a. Priority flow rules capable of giving effect to key environmental outcomes and functions³¹
- b. Flow target or threshold rules, where relevant, in order to protect flow-ecology of Basin water resources and achieve environmental watering requirements for the values to be protected by an ESLT.³²
- c. Establishment of water allowance rules in regulated systems by which a degree of water security is attached to planned environmental water that is higher than consumptive use categories. Security or reliability rules may also be attached to water for Aboriginal cultural outcomes or to town water supply
- d. Requiring all water accounting and operations to function on the basis of water actually available in the system and require WRPs to function on the basis of 'environmental watering requirements' as well as take and the interactions between these matters (environmental watering requirements and take).
- e. Interactions and integration of planned environmental water and held environmental in the use and management of Basin water resources in a WRP area under a WRP, including how the working relationship of each is to and will meet the outcomes and objectives for the WRP area in accordance with the Act.³³ These measures may supersede the obligation of 'no net reduction in the protection of planned environmental water' prior to commencement of the Basin Plan, which seems an increasingly redundant measure.

31. In general, the content and measures contained in WRPs should focus, as far as practicable, on content that is rule-like in character, or otherwise establishes enforceable standards, requirements, directions, considerations or controls.

32. In the making of a WRP by a Basin State or the Authority, or in the making of an accreditation decision by the Minister, those entities must take a precautionary approach in the performance of functions and exercise of powers to the extent it can be done consistently with the Act.³⁴ Conduct by those entities in relation to the operation or implementation of a WRP must be consistent with the precautionary principle to the extent it can be done

³¹ See also *National Water Agreement*, cl 6.1.5

³² That is to say, 'key environmental assets', 'key ecosystem functions', the 'productive base', and 'key environmental outcomes'.

³³ See also *Water Act 2007* (Cth), subs 28(2)(c) on an environmental management framework for planned and held environmental water under an environmental watering plan (which is part of the Basin Plan). The issue of such an 'environmental management framework' may be expanded to require specifically: (a) establishment and operation of such 'frameworks' in WRPs, (b) identification of the sources of PEW and HEW in respect of each WRP area in the 'framework', and (c) how those sources are to function inter-operably in order to achieve the relevant outcomes and objectives of the WRP area under the WRP.

³⁴ Cf *High Seas Biodiversity Act 2026* (Cth), s 6

consistently with the Act.³⁵ This statutory approach would be consistent with clause 6.1.8 of the National Water Agreement.

33. In our submission, it would also be advisable that design of any WRP take account of and respond relevantly to the ecohydrological distinctions, as well as connectivities and relationships, of the northern and southern basin.³⁶ These are eminently issues of national interest, over and above the relatively parochial interests of the States. Mandatory consideration of ecohydrological connection and relationships between a WRP and other WRPs (in effect, inter-valley and intra-Basin connections) should also be included in WRP content.
34. Further, in addition, the Act should be amended to include the express requirement for identification of 'environmental watering requirements' for Basin water resources in the WRP area.³⁷ This form of information should be included in the reporting obligations of Basin States under section 71(1). That category of information is a logical corollary of clarity of the term 'water available', insofar as 'water available' is a volumetric amount accounted for once 'environmental watering requirements' are met or accounted for.³⁸ We also concur with the submission of South Australia that the term 'water available' needs greater precision, such definition as 'water lawfully accessible as take.'³⁹

Strengthened Commonwealth strategic functioning in water planning

35. Second, on the question of form, the legislative scheme for WRPs (including as set out in the Basin Plan under relevant Water Act provisions) has been said to amount to a 'blueprint' for regulation and management of Basin water resources as a local level.⁴⁰ Water Act provisions, combined with the more detailed Basin Plan provisions applying to WRPs, again form a legal framework in and by which the Basin States, ordinarily, are expected to bring their relevant laws and administration into conformity ('consistency') with relevant parts of the Commonwealth law. The Commonwealth decision to accredit a Basin State WRP (which may be a complex bundle of instruments and measures) is a legislative instrument⁴¹ but a WRP as such is not a Commonwealth legislative instrument. In principle, a conforming WRP aligns the Basin State regulation of water resources with the Act's requirements and objects of

³⁵ This type of provision could be inserted into sections 58-59 of the Act

³⁶ See eg Dula et al *Connectivity Expert Panel Final Report* (2024); DCCEEW *Approved Conservation Advice for the River Murray downstream of the Darling River, and associated aquatic and floodplain systems* (2026)

³⁷ See *Guide to the Proposed Basin Plan* (2010), 90-91 for explanation of this concept.

³⁸ See also *National Water Agreement*, cll 6.1.5 and 6.1.6, which may be read as requiring priority determination of critical human water needs and environmental needs as *preconditions* to determination of the consumptive pool.

³⁹ South Australia *SA Government Submission to the Murray-Darling Basin Authority's 2026 Basin Plan Review* (2026), 117-118

⁴⁰ See Walker 2019, 51: '...in recognition that it is a large and variable system, and that the States retain control over the waters and environments within their territories, the scheme relies on this vision to be implemented at the local level through water resource plans (**WRPs**). All jurisdictions in the Basin — New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory (**Basin States**) — must follow the blueprint of the Basin Plan in the ongoing, day-to-day regulation and management of their water resources through WRPs.'

⁴¹ *Water Act 2007* (Cth), subs 63(7)(b)

sustainable use and management. A consequential duty to act in conformity with the (conforming) WRP applies to various public entities as well as water rights holders: the WRP is comprised of and under the laws of Basin States, ordered by the law of the Commonwealth. This legal ordering does not necessarily lend itself to clear enforceability⁴² and may militate against that outcome. This design is supported by express provision for the concurrence of State and Commonwealth laws.⁴³ It is based on a form of ‘cooperative federalism.’ A fair degree of practical deference to Basin State regulation of water resources in this way is logical and, ultimately, sensible in the context of the (localized) scale and jurisdictional history and practice of water resources management; it establishes a form of indirect Commonwealth involvement or intervention in water resource management in order to managing them in the national interest and otherwise achieve the objects of the Act. The sole legislated alternative is Commonwealth ‘step-in’ as a whole – effectively, Commonwealth take-over of water resources management of an entire local basin or catchment. That power has not been used, notwithstanding evident deficiencies in the making of WRPs by Basin States, and it seems unlikely to be used. It is a broad power, seemingly the ‘nuclear option’ for a non-conforming State.

36. As a further alternative to these approaches, in particular in circumstances where it is not reasonably plausible measure(s) contained in a WRP will contribute to meeting environmental needs and outcomes (environmental watering requirements), is to establish powers and functions in the Act for *selective or targeted, direct Commonwealth intervention*, such as through the making of rules protective of environmental water, rules for the timing or circumstances of take, or rules for the operation of storages. Legislative provision for such intervention would be achieved, in effect, through the making of Commonwealth subordinate legislative measures that are taken to be part of the body of a WRP. Such instruments would be directly enforceable as Commonwealth laws.
37. We propose inserting into the Act new provisions that require the Minister or the MDBA to take all reasonable steps to prepare and implement a WRP provision in circumstances where the Minister or MDBA cannot reasonably be satisfied a WRP (or provision contained in it) will achieve an outcome or objective a WRP is required to achieve. Where such intervention relates in any way to a matter protected by an international agreement (such as a Ramsar site or listed threatened species or ecological community), ‘all reasonable steps’ should be understood as requiring all due diligence⁴⁴ on the part of the Commonwealth, in the context of Australia’s international obligations, to take and implement that step.

⁴² See eg IGWC *Water Resource Plan Compliance and Enforcement Framework* (2025)

⁴³ Walker 2019, 533: ‘As legislative instruments under the relevant State and Territory laws, WRPs are enforceable in accordance with those laws by the relevant State or Territory regulators.

The Act provides for the concurrent operation of obligations under the Basin Plan and WRPs. As well as being enforceable under the relevant Basin State law, the obligation to comply with WRP requirements, including SDLs, is also given effect as an obligation under the Act (to the extent of the same constitutional limits as outlined in relation to Basin Plan obligations). Thus, the Basin Officials Committee, an agency of a Basin State, an operating authority, an infrastructure operator or the holder of a water access right must not act, or fail to act, inconsistently with the WRP.’

⁴⁴ Cf ICJ *Advisory Opinion on the Obligation of States in Respect of Climate Change* (2025), [280]-[300]

38. The above alternative pathway for direct Commonwealth intervention (as distinct from take-over) in design of WRPs would strengthen the *national character* of the use and management of Basin water resources where it is necessary or desirable to do so, whether in Australia's adherence to its international obligations or otherwise. The power proposed would be conditioned by the mandate of relevant governing entity (the Minister or the Authority) addressing and responding to the state of Basin water resources.
39. WRPs must be based on ecohydrological models available or provided in a timely manner to the Authority, which are publicly available (including datasets on which they rely), appropriate and adapted to the tasks of environmental water management (ie fit for purpose) and which are based on best available scientific knowledge. Provisions should be inserted into the Act by which the Authority cannot use or rely on water information (including hydrological models) for the purposes of performing its functions in relation not WRPs unless it can be satisfied on a reasonable basis that such information and scientific or technical content is capable, in the above terms, of informing the design and operation of WRPs.
40. We note that an enhanced Commonwealth function in water resource planning, including where directed to prioritization of environmental outcomes over other (specifically consumptive) uses may attract the operation of compensation provisions under the Act, in accordance with assignment of risk under Part 2 Division 4. Operation of those provisions are attracted where reasonably attributable to Commonwealth actions and where such interventions produce a lower SDL⁴⁵ or affect adversely the reliability of take under consumptive water rights⁴⁶ held from a certain date. While there are potentially circumstances where establishment of, for example, Commonwealth priority rules protective of environmental outcomes, assets or function could have the effect of lowering diversion limits and/or affecting reliability of water availability under existing water rights, such practical and legal outcomes are not necessarily straightforward and are likely context-dependent. Design or implementation of beneficial Commonwealth water planning rules may be devised in ways that do not have these effects and, in any case, where they do – in order to achieve environmental outcomes consistent with the objects of the Act – compensation within the parameters of the Act would be appropriate.⁴⁷
41. In our submission, any impacts of environmentally-protective Commonwealth water planning rules on consumptive uses are manageable within the scheme of the Act, the compensatory and risk management measures of the Act being long-based in the underpinning policy settings of the NWI. They are not a surprise and not a proper basis on which to avoid or impair necessary or important Commonwealth interventions directed at meeting the objects and purposes of the Act.

⁴⁵ *Water Act 2007* (Cth), s 77

⁴⁶ *Water Act 2007* (Cth), s 83

⁴⁷ See also *Johns v Minister for the Environment and Water* [2026] ARTA 746; DCCEEW *Guidelines for claiming payment under section 77 of the Water Act* (2026), [Guidelines for claiming payment under section 77 of the Water Act](#)

42. The approach proposed above on strengthening water planning is intended to contribute inter alia to meeting the object at subsection 3(e) of the Act to ‘improve water security for all uses of Basin water resources’, insofar as planned environmental water is a key water use and its security has progressively been diminished or is otherwise uncertain.
43. The above submissions are consistent with Objective 6 of the National Water Agreement and the clauses thereunder.

SDLAM and a phoenix from its ashes?

44. The SDL Adjustment Mechanism (SDLAM) is given ultimate legislative authorization by sections 23A and 23B of the Water Act. It is now notorious that it was the product of political compromise in early implementation of the Act and further notorious that it has, in an unedifying if not spectacular manner, failed – both in its terms and as a device for achieving the objects and intended (environmental) outcomes of the Act. The SDLAM was described as a ‘gamble that is wholly contrary to the objects and purposes of the Water Act. It compromises the core environmental values at stake.’⁴⁸ That description is part of a wider analysis and summing up.⁴⁹ The technical and scientific bases of the SDLAM were always highly questionable, in particular those parts of its expressing a propensity to environmental offsetting, such as supply measures. It has now been conceded that more than half of the ‘equivalent’ environmental benefits intended to be achieved through SDLAM ‘notified’ projects will not be achieved.⁵⁰ The ‘gamble’ plainly has not come off. A key question will be: what next?
45. Legislatively, that question may be answered in two ways.⁵¹ First, notwithstanding the in-principle value of some legal mechanism to ‘adjust’ the SDL(s), the policy basis of the SDLAM was substantially informed by political chicanery and, in our submission, this fact does infect the concept of the SDLAM fundamentally. The underlying outcome was the (further) ‘step down’ in recovery in water for the environment and by extension deepening the basic compromise of Basin environmental values to be protected, conserved and recovered. The SDLAM as such should be dismantled and sections 23A and 23B of the Act repealed. This approach is consistent with a proposition that there are projects and schemes notified and indeed implemented under the SDLAM that are valuable or capable of or are necessary to the achievement of key objects of the Act. Key examples of such projects include ‘constraints relaxation’ programs and certain changes to river operational settings and arrangements, each of which may well or are likely to or do achieve positive ecohydrological outcomes or are preconditions to such outcomes.
46. Such projects and programs should be retained, which brings us to the second proposition. Establishing an ordered and orderly scheme for development and formal adoption of

⁴⁸ Walker 2019, 334

⁴⁹ See Walker 2019, Ch 7 generally

⁵⁰ BOC *Basin Officials Committee Communique* (June 2026), [Basin Officials Committee Communique – June 2026 | Murray–Darling Basin Authority](#)

⁵¹ Administratively, that question will be resolved by way of the reconciliation process and how that process is interpreted and applied in practice.

programs, projects, or technical or administrative measures directed to and reasonably capable of giving effect to positive restoration of Basin water resources, aligned to international obligations and the national interest, is to be welcomed and supported.

47. Such a scheme should, in our submission, be set out in the Act distinct from the issue of 'adjustment' of SDL(s) and disconnected from any offsetting measures, or in any case subject to a revised relationship between restoration projects and the setting of a SDL(s).
48. The framing principles of such a scheme should be, consistently with extended legislative guidance for ESLT/SDL(s) above, positive legal expression of environmental values underpinning an ESLT or, in other words, outcomes-based projects or programs intended to achieve the supervening objective of establishing and implementing special measures to redress over-use and overextraction (combined with the other objectives at Water Act 2007 (Cth), subs 21(1)-(3)). More specifically, such a scheme should function legislatively as a scheme to implement the objects of the Act and the general basis on which the Basin Plan is developed under section 21 of the Act.
49. The Act may be amended to insert a new Part encompassing a scheme for a 'Basin rivers, wetlands and floodplains restoration program' ('Restoration Measures Part'). More specifically, a Restoration Measures Part of the Act would include statutory parameters and guidance, such as:
 - a. The requirement for a project or program to contribute or give effect to protection or recovery of environmental values underpinning the ESLT/SDL for a Basin water resource of Basin water resources as a whole;
 - b. The requirement for a project or program to take account of the targets set out in the GBF or other restoration targets as they concern protection or recovery of Basin water resources
 - c. The requirement for a project or program to take account of and implement Australia's obligations under a relevant international agreement as they concern protection or recovery of Basin water resources (for example, through protection or restoration of a Ramsar site or protection and recovery of an endangered ecological community intrinsically associated with Basin water resources);
 - d. The requirement for a project or program to give effect to relevant provisions of the UNDRIP as they concern protection or recovery of Basin water resources
50. Additionally, outcomes, objectives and principles throughout the National Water Agreement would be relevant and applicable to a scheme of the type proposed.⁵²

⁵² For example, the criteria and principles on which 'major water infrastructure projects' are determined, recognition and protection of Aboriginal water interests and values, public engagement in water management, water planning and management principles, and the interconnectedness of land and water.

51. A Restoration Measures Part would require formal notification of proposed projects and programs, measures for formal assessment of project and program proposals, and accreditation (including funding) for projects and programs approved by the Commonwealth. As for SDLAM projects, notification of projects or programs might occur by way of the Basin Officials Committee, which would retain an administrative and oversight function. In our view, the question of assessment of proposed projects and program should occur by way of an independent body, to which appropriate expertise is available. Additionally, in our view, the Restoration Measures Part of the Act should include provision for Aboriginal organisations to notify proposed projects and programs and to be aided in the process of preparing and notifying such proposed measures.

Water information and its governance

52. It is axiomatic that information necessary to manage and govern the water resources of the MDB is complex, vast, evolving and necessarily incomplete (affected by degrees of uncertainty). This fact does not make governance of the MDB intractable or impossible. As has been noted elsewhere, the ecological complexity of the MDB inherently requires reliance to a degree on models (hydrological, ecohydrological and otherwise). As far as the information and technical base of the Basin Plan is concerned, the functions and actions of the Authority and the Minister are required to be *scientific* and based on 'best available scientific knowledge and socio-economic analysis.' 'Water information' includes the scope of knowledge and information reflected in Part 7 of the Act and specifically section 125, the definition of which is relatively broad. Additionally, the Authority's functions, being scientific as well as administrative, include key roles and functions in development and operation of the information base of the MDB (for example, measuring, monitoring and recording the quality and quantity of Basin water resources⁵³). Importantly and relevantly, that information base is adapted to the broad, ecohydrological understanding of Basin water resources. By virtue of subs 21(4)(a), in key respects, it is also sociological and economic. The Authority may adopt the information base (such as hydrological models) of a Basin State.

53. Problems and concerns with the scientific and information base underpinning use and management of Basin water resources have been ventilated elsewhere,⁵⁴ including the failure of key aspects of the Basin Plan to be prepared on the basis of 'best available scientific knowledge and socio-economic analysis' and failure of key hydrological models to be made available transparently, in a timely manner, and to be fit for purpose (for example, for environmental outcomes in the management of Basin water resources as distinct primarily or substantially for consumptive needs or a form of commercial hydrology).

⁵³ *Water Act 2007* (Cth), s 172(1)(b), (c); see also functions at paragraphs (h), (i): 'to collect, analyse and interpret information about the Basin water resources and water - dependent ecosystems... to disseminate information about the Basin water resources, and water - dependent ecosystems, to the extent that the Authority considers it desirable to do so...'

⁵⁴ See eg *Suth Australia SA Government Submission to MDBA's 2026 Basin Plan Review* (2026), 29-31, 36-43, 111-117; Walker (2019); Dula et al *Connectivity Expert Panel Final Report* (2026); SA Commissioner for the River Murray *Submission Responding to the 2026 Murray-Darling Basin Plan Review Discussion Paper* (2026), 48-52

54. The requirement for the Authority and the Minister to act on the basis of best available scientific knowledge and socio-economic assessment must be retained in the Act. Indeed, that mandate should be extended relevantly to the exercise of all powers or performance of functions for all statutory actors in respect of all aspects of administration of the Act. The 'best available science' mandate sets a fundamental standard for proper administration of the Act, notably in the context of high degree of technical knowledge and information required for that task.
55. Further, the legal mandate of 'scientific' knowledge establishes a foundational epistemic and practical standard, importing minimum authoritative techniques and procedures such as the replicability and verifiability of knowledge. In our submission, legislative guidance on key features of 'scientific knowledge' should be considered for incorporation into the Act. This guidance could be included in the definitions section of the Act or in section 21.
56. The question of the role and character of Aboriginal cultural knowledge is relevant to the proper informational base for administration of the Act. Presently, this issue appears to rely solely on the information and views of Aboriginal people or organizations in the preparation of water resource plans. In practice, Aboriginal cultural knowledge is sought and incorporated into planning and decision-making on a relatively ad hoc basis, with little or no legal guidance or consistency. The base of Aboriginal knowledge, law/lore and cultural authority notionally required under the Basin Plan is not necessarily well-aligned with established legislative concepts such as 'Aboriginal tradition.'⁵⁵
57. The failure (previous and continuing) to take into account climate change considerations in the setting of ESLT/SDLs (including climate projections) also represents a failure to act on the basis of best available science and thereby a failure in water information governance underpinning the scheme and its implementation. Shortcomings in this scientific base are compounded by constraint of climate change effects to inflows and inflow models rather than the entire ecohydrological cycle (for example, climate change effects on evapotranspiration of crops and native vegetation).
58. Datasets, models and the information base informing planning and decision-making under the Act must include data and outcomes reflective of real-world conditions and outcomes, which is to say 'ground-truthed' models and technical inputs.⁵⁶ The precise correlation of models and ground-truthing (detections, observation and so forth) will vary according to needs and circumstances.

⁵⁵ See eg *Aboriginal and Torres Strait Island Heritage Protection Act 1984* (Cth), 3; *Aboriginal Land Right (Northern Territory) Act 1976* (Cth), s 3

⁵⁶ Cf *Friends of Leadbeater's Possum Inc v VicForests* (No 4) [2020] FCA 704, [455]-[482]. Compare also Her Honour's (as she then was) opinion at [462]: "'On the ground" searches and surveys, and detection work, may be more labour intensive and time consuming, but it is clearly more reliable. And it does something no amount of modelling can do: it tells those interested in this matter which parts of the forest the threatened species is, in fact, using. Therefore, what can be protected is what the species is using, and – derived from this – what it might use in the foreseeable future. Protection becomes, in this way, a reality and not a theory.'

59. In light of the above comments, we make the following submissions on clarifying and strengthening the scientific and information basis of the Act. These submissions are directed to improvement in the governance and content of information base for administration of the Act.
60. It may be advisable to distinguish in the Act between water information, technical content and science applying to the Basin and to these matters nationally. National standards and directions are important but the far greater attention of the Act is to the use and management of Basin water resources.
61. The mandate at subsection 21(3)(b) must be retained in the Act, which is to say the requirement that design and implementation of the Basin Plan and related measures must accord with the Authority and Minister acting on the basis of the best available scientific knowledge and socio-economic assessment.
62. The Act should include additional legislative guidance on key principles and standards of *scientific* knowledge. Additionally, legislative guidance on 'socio-economic assessment' as including sociological knowledge and opinion would be helpful.
63. The MDBA and IGWC must be satisfied on a reasonable basis that they have all relevant information and opinion necessary to perform its functions and discharge its duties, including but not limited to information necessary to manage Basin water resources and to establish an ESLT/SDL for the Basin as a whole, for each WRP area, and for the northern and southern Basin components.
64. Those bodies may direct production of documents or information, including from Basin States or their agencies or from elsewhere, in order to achieve the state of satisfaction above.
65. In our submission, the Authority should only be able to act in accordance with section 172(2) of the Act (adopt or request measures, records or conclusions of a Basin State) where it is satisfied information adopted or requested is scientifically valid, credible, transparent, or otherwise of clear probative value (fit for purpose) in the circumstances in which it is to be used. Such values and purposes must include (but not necessarily be limited to) information concerning 'environmental watering requirements' of Basin water resources or comparable terms.
66. Hydrologic or ecohydrological models must be publicly available, credibly peer-reviewed and not otherwise available to inform decisions or actions under the Act.
67. 'Socio-economic analysis' should include socio-economic analysis of impact of water regulation, use and management of Basin water resources on Aboriginal communities including as their social, economic and cultural rights or interests are affected. 'Socio-economic analysis' should expressly contemplate sociological as well as economic analysis.

First Nations' rights and interests and promoting the principles of UNDRIP

68. We refer to our submissions on First Nations' rights and interests made in the Basin Plan Review and extend on those submissions here. We note that the remit of the review under section 253 is slightly different insofar as it includes the express consideration of UNDRIP and opportunities to promote it under the Act.
69. The intimate, ancient and continuing relationships of Aboriginal peoples to what is now termed the MDB is irreducible from the practical constitution of that place. Those relationships are not – or at least not in any effective way – reflected in the law, specifically in the Act, which in itself is an expression of their erasure and its injustice. The Act must move toward contribution to remedy of that injustice.
70. A new Part should be inserted into the Act that gives effect to special measures:
- a. To address the fact of adverse impacts of historic water resources development in the MDB on the rights and obligations of Aboriginal peoples in the MDB⁵⁷ as those rights and obligations accord with Aboriginal tradition and custom, rights reflected in the UNDRIP, and rights or interests reflected in Australia's obligations under relevant international agreements;
 - b. To ensure consistency of the conduct and operation of the use and management of Basin water resources specifically with Australia's obligations under Article 8(j) of the Biodiversity Convention; and
 - c. To ensure consistency of the conduct and operation of the use and management of Basin water resources specifically with the articles of the UNDRIP as those special measures address.
71. Further to our prior submissions on legal formulae and measures or decision points to which Aboriginal rights and interests in decision-making should apply,⁵⁸ we make the following contributions and submissions:
- a. The Act might provide for a statutory schedule under which key actions or decision points in the use and management of Basin water resources attract obligations for participation, consultation, negotiation and/or agreement (consent) of Aboriginal peoples or representatives. Such obligations may be graduated on the basis of anticipated impacts or risk of impact on Aboriginal rights or interests in Basin water resources.

⁵⁷ See Walker 2019, 500-501 in the Commissioner's endorsement of insertion of an additional statutory fact into subsection 21(2)(a) of the Act.

⁵⁸ See EJA submissions on the Basin Plan Review at [127]

- b. The Act should provide for procedures for recognition of Aboriginal representative bodies, which in our view would best proceed from the Victorian experience of treaty and treaty-making.
 - c. The Act should provide for a principled framework for interactions and conduct as between Aboriginal peoples and their representatives on the one hand and entities or agencies of the Commonwealth and Basin States on the other hand. Such rules and principles of conduct should be binding on those parties.⁵⁹
 - d. Any such principled framework must include provision for recognition and promotion of Aboriginal law, tradition or cultural authority in respect of conduct and dealings.⁶⁰
 - e. In respect of projects notified under what we propose for a Restoration Measures Part of the Act, Aboriginal people and their Country affected or benefiting from such projects should be parties and participants in the design, assessment and implementation of such measures.
72. Active steps are already underway for design and implementation of governance arrangements for an Aboriginal or First Nations water holding entity. Such an entity would presumably hold and use water recovered from the consumptive pool for the purposes of giving effect to cultural flows, or what in substance would amount to cultural flows. Once agreed or resolved that institution should be given statutory expression or statutory support in the Act.
73. A necessary incident of First Nations' water holdings and arrangements is a water planning scheme for the use and management of those holdings (cultural flows water planning). The Act should anticipate a framework for such planning by communities and representatives affected. The Act would need also to anticipate the intersections and interactions between cultural flows water planning and general water resource planning under the Act. In this respect, it seems appropriate that WRP requirements include pathways for adoption of cultural flows plans within the ambit of WRPs.

Institutional development and evolution

74. Comprehensive institutional architecture is essential to proper operation of the Act and achievement of its objects. Notwithstanding shortcomings in actual function or practice (as noted elsewhere), the nature and distribution of functions and powers under the current institutional arrangements is appropriate and necessary, although arguably not sufficient. That distribution includes *inter alia* the political institution of the Minister, the scientific, administrative and water-operational institution of the Authority, the compliance and accountability institution of the IGWC, the high-level policy and administrative institution of

⁵⁹ See eg *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), Part 3

⁶⁰ See eg First Peoples' Assembly of Victoria and the State of Victoria *Treaty Negotiation Framework* (2022), [Treaty-Negotiation-Framework-Signed.pdf](#)

the BOC, the water-holding institution of the CEWH, the ACCC in relation to water markets, and the Productivity Commission in relation to implementation of the Act and water reform. These are the Commonwealth institutions, alongside which Basin State institutions play their necessary roles.

75. Commenting on the architecture as such, we submit that there are two principal gaps or shortcomings in this Commonwealth architecture which should be remedied:
- a. Basin First Nations' water-holding, management and planning institution(s), properly reflective of UNDRIP principles and Australia's obligations under Article 8(j) of the Biodiversity Convention, as discussed elsewhere in these submissions;
 - b. Establishment of an Independent Water Commission, empowered to advise on and inquire into administration and performance of the Act, including as it deems necessary by quasi-judicial means. Certain functions presently vested in the Productivity Commission or the ACCC could be vested in such a body, although that need not be the case. Rather, we submit that such a body should have powers and remit to inquire into conduct or action by public bodies or private entities having or likely to have a significant impact on the use and management of Basin water resources in accordance with the objects of the Act. In this way, such an inquisitorial body might mirror the NSW Natural Resources Commission, albeit with functions and powers directed to core measures of the Act and scope for public inquiry. In our submission, the power for such a Commission to make inquiries into significant impacts should extend to any significant impact, in the Commission's view, arising from a transaction of water access rights in the water market.

Enforcement

76. Enforcement of the law and capacity to enforce the law are fundamental to its proper administration. In this respect, we propose two reforms to design and operation of the Act to assist with its enforcement:
- a. Amendment of sections 140 and 144 of the Act to permit any person to apply for the remedies contained in those sections, as distinct from 'appropriate enforcement agencies' solely being vested with statutory jurisdiction. We submit that in general such 'open standing' is desirable to the enforcement of laws governing matters substantially of public interest (which properly characterizes the Water Act, being an Act for the use and management of a key public good, namely water resources). Currently, it would be open for any person to commence and maintain proceedings for enforcement of the Act where they meet the equitable 'special interest' test. We think the requirement to demonstrate such standing is an unhelpful and unnecessary barrier to enforcement of public interest laws.
 - b. In alignment with our submissions above on incorporation of direct Commonwealth legislative provisions into water resource plans, the powers of the IGWC would be

extended to include enforcement of such provisions, in addition to existing enforcement or compliance provisions with respect to 'consistency' of water resource plans with the Basin Plan and the Act and with respect to acting as the 'regulator or regulators.'⁶¹

77. An 'action plan' required to be prepared in accordance with subsection 71(1)(h) of the Act should function as an enforceable compliance mechanism, specifically a mechanism for remedy of non-compliance with a WRP area SDL by a Basin State, its agency, water access rights holders and/or other relevant actors. To these ends, the 'action plan' mechanism should be elaborated under the Act (including as necessary cross-referenced functions and powers as between section 71 and enforcement provisions under the Act). The scope, purposes and steps of such 'action planning' should be addressed in the Act. At a minimum, that scope, purposes and steps should include the extent and nature of non-compliance, steps to bring relevant WRP provisions into conformity with the law, measures or programs addressing necessary to restitution or re-establishment of environmental outcomes or pathways toward them. The IGWC should be given functions and powers in respect of such compliance.

A note on 'cooperative federalism' in national water law

78. Impressed by the way in which the Water Act scheme substantially overcame a century of parochial politicking, Commissioner Walker waxed lyrical on the Water Act's mandate of a 'particular brand of cooperative federalism':⁶²

*As with an orchestra, under appropriate stewardship, these disparate sources of regulation can form together to produce a symphony of co-operative Federalism, and are capable of regulating the Basin's water resources in the national public interest.*⁶³

79. The Water Act is a cooperative-federalist venture, one which has sought to impose a defining and national order on the use and management of Basin water resources.⁶⁴ Constitutional authorities of nationhood and Australia's international affairs are integral to this ordering. Given submissions and commentary above seek to advocate for a greater and clearer Commonwealth functioning in the present venture, we turn briefly to legal consideration on which such strengthening (in a targeted manner) of a Commonwealth role may depend.

80. In key respects, the scheme of the Act turns heavily on a still largely de-centralised federal relationship. Fundamental State functions and roles are maintained, albeit aligned with national and international priorities under a national scheme. Administration of water planning and the technical base enabling use and management of Basin water resources

⁶¹ IGWC *Water Resource Plan Compliance and Enforcement Framework* (2025), 6

⁶² Walker 2019, 118

⁶³ Walker 2019, 117

⁶⁴ Cf eg French 'The future of Australian constitutionalism' (2009), <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/frenchcj/frenchcj27nov09.pdf>, 8: 'The prominence of cooperative arrangements in Australia reflects agreement that issues which not so long ago would have been treated as entirely within the province of the States are now regarded as national. The trend may be seen as enhancing in an extra constitutional sense, central power. The constitutional enhancement of central power began many years ago.'

represent areas in which the prevailing degree of reliance on Basin States is at best highly problematic. In order for the 'national interest' in water management to be sufficiently rendered effective, where it is plainly necessary to do so (such as for implementation of Australia's international environmental obligations plausibly to be achieved), strengthened Commonwealth powers and duties are likely required and the Act should address this issue expressly as we have noted above.

81. The constitutional balance protective of the federal character of the Australian polity vests broad, plenary legislative powers in the Commonwealth in respect of implementation of Australia's international obligations, including under environmental treaties.⁶⁵ That power is not unlimited. Its exercise must be 'reasonably capable of being considered appropriate and adapted' to giving effect to the objects or purposes of the treaty at issue.⁶⁶ The laws must implement *bona fide* international obligations.⁶⁷
82. Similarly, it is now settled law that, by operation of section 61 of the Constitution (in concert with the incidental powers provision of s 51(xxxix) of the Constitution), the Parliament may legislate for matters for 'enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.'⁶⁸ This power is commonly referred to as the 'implied nationhood power.' It is a key part of the constellation of Commonwealth legislative powers giving the Act constitutional validity. There may be questions as to how or whether this source of power permits the Commonwealth to legislate to coerce or compel the States to conduct themselves in certain ways, such as in relation to their use and management of Basin water resources (and the Minister to act under such legislation), the basis of which is to avoid interfering with or undermining the States as independent polities within the federation.⁶⁹ It is nonetheless likely this source of power is or can be supported, broadly, by the functions of the national government in implementing treaty obligations – or, that is, legislating for matters of external affairs – those being matters 'peculiarly adapted' to the role of the national government. For present purposes, those functions and 'activities' include Australia's international treaty obligation in respect of Ramsar wetlands – indeed, all wetlands – and biodiversity, widely understood. Human rights and indigenous rights concerns are also relevant. While the coercive or compulsive character of Commonwealth water law, where evident (such as in imposing controls on water extraction or take), may bear constitutional uncertainties under the nationhood power, the external affairs power or a combination of both powers are sufficient to support clear, effective Commonwealth interventions into Basin water management for environmental purposes or other purposes supported by international agreements.

⁶⁵ *Richardson v Forestry Commission* (1988) 164 CLR 261, [33]

⁶⁶ *Richardson v Forestry Commission* (1988) 164 CLR 261, [12]

⁶⁷ *Commonwealth v Tasmania* (1983) (Tasmanian Dams Case) 158 CLR 1

⁶⁸ *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (Mason J)

⁶⁹ See eg Stephenson 'Nationhood and section 61 of the Constitution' [2018] 43 *University of Western Australian Law Review* 2 148

83. As to whether strategic or targeted Commonwealth intervention affecting, for example, Basin States' water rights schemes would offend other constitutional principles protective of Australia's federal character, such a possibility seems unlikely, short of Commonwealth action designed to impair fundamentally the States' water rights legislation. Use of water planning or other mechanisms to control, limit or 'sterilize' specific water rights or classes of water rights would generally be unlikely to offend implied immunities on Commonwealth denial of States' capacities and functions, where the relevant 'multifactorial assessment'⁷⁰ occurs – an assessment that would include clear reference to express constitutional heads of power enlivening Commonwealth power to legislate in respect of Basin water resources (such as the external affairs power). In any case, the Act presently contemplates effective Commonwealth take-over of water planning for any specific WRP area in certain circumstances, by Authority preparation and Ministerial adoption of a WRP.⁷¹

Measures for national effect of Water Act

84. As the Reviewer has noted, application of the Act to national matters is limited, specifically to provisions concerning water information. In our view, while it would be constructive from a policy perspective to extend certain measures or principles operating under Commonwealth water law beyond the MDB, advantages in doing so (such as raising standards on water management nationally and learning from the experience of the past two decades) are best confined to limited and specific matters. In general, therefore, we do not advocate for general extension or application of the Act's provisions nationally in this round of review and/or reform.

85. For the above reasons, we submit that the Act should be amended to contend with two issues:

- a. Incorporation of the use and management of water resources of the Snowy River scheme into the scheme of the Act and the Basin Plan. Presently, the effect of operation of the relevant licence governing Snowy water resources in the Upper Murrumbidgee River (and their connection to the Snowy Hydro scheme) is exempted from operation of the Act and the Basin Plan. Governance of water resources in the Upper Murrumbidgee and Snowy Rivers has been widely criticized as poor and dysfunctional, leading to failing and declining environmental outcomes. These failures are structural and institutional, which is to say legal and regulatory arrangements in place are not capable of achieving or implementing objectives and targets under the exempted arrangements.⁷²
- b. Consistently with the objectives and principles of the drafted National Water Agreement,⁷³ the Act should include new provisions concerning minimum and

⁷⁰ *Clarke v Commissioner of Taxation* [2009] HCA 3, [34] (French CJ)

⁷¹ *Water Act 2007* (Cth), Part 2 Division 2 Subdivision E

⁷² See eg Bender et al 'Snowy River environmental flows post-2002: lessons to be learnt' (2022) 73 *Marine and Freshwater Research* 4 454; also submissions to the SWIOID Review from the IGWC (submission 122), the CEWH (submission 101), and Pittock and McGuire (submission 130).

⁷³ *National Water Agreement*, Objective 1 and specifically cl 1.1-1.3, 3.7-3.8

universal standards for meeting basic human water needs, in accordance with relevant human rights principles. Such standards may be drafted into a national code or similar instrument, to be applied to the use and management of all water resources in Australia that are relied upon to meet human water needs (including for example safe drinking water, water for household consumption, and safe sanitation). To facilitate this approach and these national outcomes, especially in regional and remote areas, we propose the Act include measures requiring the Commonwealth to take all steps reasonably necessary to ensure critical human water needs are met in areas and regions where there is a real risk water supply and services are not in accordance with the human right to water.⁷⁴ Further to these ends, in our submission, the Act should provide legislative support for the priority rules contained in clause 6.1.5 of the drafted National Water Agreement, namely '[setting out] a hierarchy of uses that serves the greatest public interest, prioritising critical human water needs and environmental sustainability.' This approach to prioritization may also be expressed in terms of the human right to water (or critical human water needs) having priority within the consumptive pool and/or that this component of the consumptive pool functions within sustainable extraction limits.⁷⁵ The means by which the Commonwealth's functions and powers in this respect are performed or exercised would likely depend on the particular circumstances, such as whether national right to water standards are to be applied in a State or Territory. But in any case, legislative measures may be supported constitutionally by the external affairs power (implementation of international human rights law), the nationhood power (agreements with States and incidental legislation), the Territories power, or a combination of the above.

⁷⁴ See eg UNOHCHR *The Right to Water: Fact Sheet 35* (2021), [FactSheet35en.pdf](#); also UNGA *The Human Rights to Safe Drinking Water and Sanitation* (A/70/489/Add.2, Resolution of the General Assembly, 17 December 2015), [The human rights to safe drinking water and sanitation :](#)

⁷⁵ See *National Water Agreement*, Schedule C, principle 6.

Appendix

Summary submission on the objects of the Act under section 3

Pinpoint under s 3	Object	Comment and submission
(a)	Enable the Commonwealth, in conjunction with Basin States, to manage Basin water resources in the national interest	The Act creates the enabling environment and framework to manage Basin water resources in the national interest. It is instrumental to enabling Commonwealth functioning in this space. On proper construction, this object intends that the Act is facilitative of the Commonwealth's role and that role, by implication of the nexus of Basin water resources and the national interest, is to be a leading role within a federal arrangement. As noted in our above submissions, the Commonwealth role has been frustrated by design of powers and functions in respect of water planning, in respect of the information or technical base of water management, and continued overbearing political conditions of interjurisdictional arrangements.
(b)	Give effect to international agreements	The Act is integral to applying and giving effect to international environmental agreements in respect of Basin water resources, with specific focus on the Ramsar Convention and the Biodiversity Convention. The Act is a reasonably appropriate and adapted expression of those agreements in domestic Australian law. On proper construction under this provision and elsewhere in the Act and Basin Plan, the object concerns <i>conforming implementation</i> of relevant international treaties and in particular core obligations under those treaties. It is questionable that instruments prepared under the Act (including the Basin Plan and WRPs) properly give effect to relevant international obligations, or do so faithfully, having regard, for example, to evidence that measures contained therein are insufficient to maintain the ecological character of many Ramsar sites or to protect and contribute to recovery of listed threatened species or ecological communities. It is unlikely, on present settings devised under the Act, operation of the Act gives effect to 'sustainable use' of Basin water resources within the meaning of the Biodiversity Convention.
(c)	In giving effect to international agreements, manage water resources 'in a way that optimizes economic, social and env outcomes'	The legal scheme of the Act on its proper construction achieves this object by requiring primacy to environmental considerations as contained in and representing the fundamental subject-matter of relevant international agreements. 'Optimization' of the various sources of outcomes is to occur within this context of implementing agreements. In practice, consistent with our submissions above, we endorse the view that environmental outcomes have not been 'optimized' in a way consistent with treaty obligations, in that they have not been accorded legal effect or weight as required by the Act and treaty terms. Social outcomes generally have been accorded a residual status or weight, typically conflated with economic outcomes (especially for irrigation communities) and not separately or clearly addressed. For example, insofar as optimization of social development outcomes is to address historic exclusion and injustices for Aboriginal communities in the MDB that has not occurred. Where protection

		and recovery of water ecosystems have not occurred or are deficient, linked social outcomes, such as attached to education, health and cultural benefits (for Aboriginal and non-Aboriginal communities), are likewise not achieved. Overall, 'social' outcomes are poorly interrogated or considered.
(d)(i)	Ensure return to ESLT for overallocated or overused resources	The principal provisions under the Act designed to address overallocation or over-use of water resources are properly contained within the Act, including SDLs based on an ESLT. Actual settings of those measures are not in accordance with the Act, by which the assurance contained within the object is not or cannot be met.
(d)(ii)	Protect, restore and provide for the ecological values and services of the MDB	The scheme of the Act provides for this object to be met. In actual operation, outcomes have been very mixed, including as a consequence of inadequate or deficient administration of or delivery under the Act. Broadly speaking, some components or functions of Basin water resources (a small if important minority such as in-channel components) are used or managed to these standards and much more extensive components and functions are not.
(d)(iii)	Secondarily, maximize net economic returns from use and management of Basin water resources	Achieving economic indicia across the MDB has been more readily met than any other set of indicators. ⁷⁶ In our submission these outcomes appear to be approached as a primary rather than as a subsidiary or secondary matters (on achievement of primary environmental outcomes and sustainable limits contained therein), an approach to use and management of Basin water resources inconsistent with the scheme of the Act. Such outcomes appear to favor irrigation communities and there is no clear evidence that economic returns have been maximized for all sectors across the Basin or all affected groups (for example, economic outcomes for Aboriginal communities).
(e)	Improved water security for all water uses of Basin water resources	Security of consumptive uses of Basin water resources for private, commercial use has been improved insofar as trajectories of reform (commenced under the NWI) toward greater legal security of water rights within a functioning and well-institutionalized water market have continued and deepened under the Act. Environmental water holdings held under comparable entitlement frameworks benefit from similar security. Planned environmental water has been characterized by declining security or otherwise unstable, diminished, opaque or compromised protections. Aboriginal rights and interests in Basin water resources continue to be characterized by an almost total absence of legal security.
(f)	Ensure management of Basin water resources takes into account broader management of MDB natural resources	In practice the nexus between water resources management and wider natural resources management (such as concerning land or wildlife) has been addressed partially, such as through so-called 'complementary measures' and through management of matters such as interception activities. An effective landscape-scale management approach is likely constrained by the complexity and

⁷⁶ See eg Colloff et al 'Murky waters running clearer? Monitoring, reporting and evaluation of the state of the Murray Darling Basin after more than three decades of policy reform' (2024)75 *Marine and Freshwater Research* doi:10.1071/MF24193

		scale of the interactions at issue. A degree of interaction (accounting for broader NRM) has been achieved by inherent connections between water, land and biodiversity in management of water ecosystems to which the Act applies, such as floodplain forests. The breadth of meaning of 'water resources' under the Act contributes to achieving this object in law.
(fa)	Ensure use and management of Basin water resources takes into account spiritual, cultural, environmental, social and economic matters relevant to Indigenous people, including in relation to their knowledge, values, uses, traditions and customs.	This object has not been achieved, generally other than in a rhetorical, symbolic or merely administrative way. Water holdings of Aboriginal peoples remain negligible. Involvement in water planning remains at best highly formalistic and without any real substance. Distribution of economic benefits to Basin Aboriginal communities, as a result of operation of the Act, are at best uncertain.
(g)	Achieve efficient and cost effective water management and administration re Basin water resources	The Act has achieved this object in part. Recalibrating ecological conditions across the MDB in order to remedy historic overextraction (in the context of a changing climate) was always to be an extensive, complex and ambitious undertaking. Plainly, it was also necessary, as Parliament has stated. Impressive and wide-ranging institutional and regulatory machinery has been established. Serious concerns as to the administrative competence of key institutions have nonetheless been worrying and continue to require attention. Those institutions include the Authority and water policy-makers in Basin States, such as NSW and Victoria. Those concerns were addressed <i>inter alia</i> in the Final Report of the SA Royal Commission. They are also to be found in studies on regulatory capture of water institutions especially in the Basin States ⁷⁷ and integrity failures in Commonwealth water governance. ⁷⁸ Enhancement of powers and resources available to the IGWC for example would aid this object, alongside greater transparency in government contracting and decision-making.
(ga)	Governance of water markets	No comments.
(h)	Provide for the collection, collation, analysis and dissemination of information about Australia's water resources and the use and management of water in Australia	This object has been achieved in part. The Act has provided a major stimulus for generation and dissemination of information about Australian water resources, especially but not exclusively in the MDB. Achievement of the object weakened by two main effects: first, the set of regulatory and governance problems referred to in the above submissions (such as failures to act in accordance with clear and agreed scientific standards, lack of transparency, and questions around fitness for purpose and probative value of the information base); second, the institutional landscape for the task evidences certain important gaps, such as scientific-technical functions left by abolition of the National Water Commission, absence of well-resourced specialist inquisitorial bodies (now partly filled by the IGWC), and attaching the complex

⁷⁷ See eg Grafton and Williams 'Rent-seeking behaviour and regulatory capture in the Murray-Darling Basin, Australia' (2020) 36 *International Journal of Water Resources Development* 2-3 484

⁷⁸ Colloff et al 'Scientific integrity, public policy and water governance in the Murray-Darling Basin, Australia' (2021) *Australasian Journal of Water Resources*, <https://doi.org/10.1080/13241583.2021.1917097>

		tasks of water information onto existing, likely overloaded entities such as CSIRO and BoM.
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