

Friends of the Earth Melbourne**Submission: Water Act 2007 (Cth) Review**

3rd July, 2014

Dear Expert Panel members,

Thank you for the opportunity to provide input into the review of the Commonwealth Water Act 2007 (the Act). Friends of the Earth has worked for over a decade to advocate for legislation that underpins sustainable management of Australia's rivers and waterways.

This submission focuses on a key aspect of national water reform: improving Indigenous Australians' access to water resources, with a specific focus on the Murray-Darling Basin.

While we do not have the scope here to expand on other issues, we support and endorse the key principles contained in Environmental Justice Australia's (EJA) submission to the review. In particular, we support the principle that the core elements of the Act should be maintained in their current form, to ensure the Basin continues on its path to long-term sustainability.

Terms of Reference 1 (a) (v) – The extent to which other key elements of the Basin Plan are being implemented.**Indigenous access to water resources**

Indigenous Nations have managed and lived alongside Australia's rivers and waterways for tens of thousands of years. Complex systems of customary water law and management defined careful use of water resources. Traditionally, many Aboriginal people lived alongside waterways and harnessed water resources to develop permanent settlements and sophisticated social and economic systems, such as the elaborate eel farms established by the Gunditjmarra people at Lake Condah, in Western Victoria. For many Indigenous Nations, cultural traditions, community wellbeing and economic activity continue to be dependent on healthy rivers and meaningful access to the water resources that form the 'lifblood' of Country.

In the Murray-Darling Basin, over 40 Indigenous Nations have documented their rights and interests in water and appealed for recognition in legislation and management processes.¹ Yet, the ability of Indigenous people to enjoy and exercise their strong relationship with land and water has been severely compromised. The over-allocation of water resources in many Basin rivers and ongoing legislative impediments are major barriers to Indigenous people's enjoyment of their rights to water.

While policy in some jurisdictions has provided generalized support for the provision of water to Indigenous people and the inclusion of Indigenous people in water management decisions, there is little substantive, legislative recognition of these principles.²

The current review of the Water Act 2007 provides an opportunity to address deficiencies in the provision of Indigenous people's rights and interest in water resources.

Rights

Continuous ownership and custodianship of water resources, as well as Australia's international obligations and national policy confer on Indigenous people the right to manage, access and own water.³ These rights must be incorporated as a core tenet of Australia's water management framework. To that end, Friends of the Earth supports the First Peoples' Water Engagement Council (FPWEC) 2012 Recommendations to the National Water Commission (NWC) which state that:

'All Australian governments...review existing legislation related to the management of water resources and enshrine in future legislation the principles set out below, including mandatory:

- Aboriginal engagement in decision-making, planning and management;
- Aboriginal access to water for cultural and economic purposes; and
- provision of necessary research, support and capacity building to participate fully and effectively in water planning and management.'⁴

Indigenous people have asserted both their *procedural* rights (the right to be active participants in formulating decisions that affect them) and *substantive* rights (the right to possess, use and enjoy flows of water as they see fit).⁵

Indigenous Nations of the Murray Darling Basin have articulated their specific water resource needs and advanced a clear definition of water requirements using the term 'cultural flows'. Cultural flows are defined as

*'Water entitlements that are legally and beneficially owned by the Indigenous Nations and are of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is our inherent right.'*⁶

The water rights of Australia's First Nations have been clearly established, with over a decade of research, advocacy and representations by Indigenous groups. Unfortunately, these rights are not reflected in Australia's predominant water legislation.

National Water Initiative

The National Water Initiative (NWI) sets out a number of principles covering Indigenous access to water and engagement in water planning. All jurisdictions including the Commonwealth are required to comply with these requirements.

The relevant sections of the NWI are as follows:

52. The Parties will provide for indigenous access to water resources, in accordance with relevant Commonwealth, State and Territory legislation, through planning processes that ensure:

- i) inclusion of indigenous representation in water planning wherever possible; and*
- ii) water plans will incorporate indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed.*

53. Water planning processes will take account of the possible existence of native title rights to water in the catchment or aquifer area. The Parties note that plans may need to allocate water to native title holders following the recognition of native title rights in water under the Commonwealth Native Title Act 1993.

54. Water allocated to native title holders for traditional cultural purposes will be accounted for.

A number of researchers have noted that provisions in current State and Commonwealth legislation do not fulfill these requirements.⁷ Recognition and implementation of the NWI requirements has been deficient in most jurisdictions. The Water Act 2007 is inadequate in failing to provide statutory recognition of Indigenous interests in water.

This deficiency is evident in the lack of progress on meeting Indigenous people's water needs. The National Water Commission's 2013 review of Indigenous involvement in water planning found that 'Overall there has been no substantial increase in water allocations for Indigenous purposes-social, economic or cultural. The challenges in Indigenous water allocation and access remain largely the same as in 2010.'⁸

United Nations Declaration on the Rights of Indigenous People

The United Nations Declaration of the Rights of Indigenous People (UNDRIP) supports Australian Traditional Owner's claims for access to water resources. Article 26 states that

'Indigenous peoples have the right to own, use and develop the lands, territories and resources, which they have traditionally owned. Additionally, States should give legal recognition and protection to these areas.'

It further states that states should consult with Indigenous peoples regarding their rights to lands, territories and resources. Governments must ensure access to lands, water and resources that are essential for the cultural survival of Indigenous people.⁹

These internationally defined and recognised rights should be reflected in Australian legislation. As one of the objectives of the Act is to 'give effect to relevant international agreements,' there are strong grounds for including the UNDRIP as a 'relevant international agreement' in the regulations for the Act and including specific provisions in the Act to give effect to the rights specified in that agreement.

Indigenous people are major stakeholders in the management of water resources, as evidenced by the strong recognition of their interests in the acknowledgement contained in the Murray Darling Basin Plan¹⁰. The UNDRIP is a crucially relevant international agreement for this significant stakeholder group.

Indigenous Nations have advanced strong claims to access, own and manage water resources. These claims are reinforced by a range of national and international policies, instruments and agreements. There are compelling grounds for amendments to the Water Act 2007 to give effect to these unrealized rights and interests.

Strengthening the statutory recognition of Indigenous rights and interests in water resources would significantly improve the Act and help to meet the requirements of national and international policies and agreements.

Co-benefits

In addition to satisfying the Commonwealth's obligations, improved recognition of Indigenous water rights in the Act can also provide significant co-benefits including enhanced outcomes from management of environmental water, Indigenous economic and community development opportunities and enhanced health and well-being for Indigenous communities.

There is strong institutional recognition of the values of Indigenous Ecological Knowledge in directing successful environmental water management. Indigenous ecological knowledge can inform contemporary water management activities including water allocation planning.¹¹

Enhancing access to water resources is also crucial to address Indigenous disadvantage and inequality. It can thus be a powerful tool to help 'close the gap' in Indigenous health, life expectancy and socio-economic outcomes.

Dispossession of land and water resources has undermined the basis of a strong Indigenous economy. As Jackson and Langton (2011) explain 'Indigenous people own almost 20% of the country's land mass, while Indigenous specific water entitlements are at present such a minuscule figure that is estimated at less than 0.01

per cent of Australian water diversions.’¹² This disparity illustrates the challenges faced by Indigenous people in seeking to develop water-dependent businesses and enterprises.

The FPWEC explain that ‘access to water from the consumptive pool can be an important component of the broader platform to help Aboriginal people to generate economic development and is therefore a sound strategy for “closing the gap”’.¹³

Current barriers and opportunities for reform

There are a range of proposed governance arrangements for providing Indigenous water allocations and enhanced involvement in water management.¹⁴ However, legislative impediments and over-allocation of water resources currently limit options for Indigenous ownership and management.

The Act contains a very limited recognition of Indigenous procedural right and does not establish any substantive right to access water resources. The current references to Indigenous interests are limited to largely descriptive or discretionary requirements. The Act’s recognition of Indigenous interests is inadequate, with just one basic requirement to ‘have regard to’ Indigenous issues among a long list of other considerations, and one requirement to set up an Indigenous consultation committee.¹⁵

These provisions in the Act do not fulfill the Commonwealth’s obligations under national and international policies and agreements or the policy advice of leading Indigenous representative organizations.

The Act also reinforces the erroneous assumption that Indigenous water uses are inherently non-economic and non-consumptive, framing them as ‘public benefit issues’ as opposed to the ‘consumptive and other economic uses of Basin water.’¹⁶

A dedicated Indigenous water allocation or entitlement, enshrined in legislation, is a key objective of Indigenous representative organisations across Australia. Friends of the Earth supports the long-term aspiration of Indigenous organisations to ensure legislative recognition of their water access rights.

The fact that many of the Basin’s rivers are fully or over-allocated is a fundamental barrier to achieving a more equitable distribution of water resources. In this challenging context, a range of approaches should be fully considered. These include:

Co-management of environmental water.

It is often assumed that Indigenous water requirements are limited to non-consumptive use and hence, environmental water can act as a surrogate for Indigenous water needs. While this perspective fails to account for the extent of Indigenous rights and interests in water, there are important gain to be made from more sensitive management of environmental water. The FPWEC explain

that 'If it is managed properly with adequate Aboriginal engagement, environmental water may go part of the way, or in some cases all of the way, towards meeting Aboriginal Water needs.'¹⁷

Environmental water owned by the Commonwealth and managed by the CEWH could be co-managed with or provided to Indigenous Nations to support mutual environmental and cultural outcomes.

Indigenous allocations

Influencing environmental watering decisions does not, in many cases, provide the quantity or security of water required to meet a diverse range of Indigenous needs.

Indigenous groups have articulated their right to autonomously own and manage water allocations for cultural, environmental and economic development purposes. In less-developed and unregulated systems this could be supported by the provision of strategic Indigenous reserves, as included in Northern Territory policy until recently. Some State governments have established Indigenous access licenses. Queensland and New South Wales legislation provides for an Indigenous share in an allocation process, for either cultural, social or economic purposes.

In fully-allocated systems this would need to be supported by a water trust or fund to acquire water for Indigenous consumptive use, as has been trialed in NSW.¹⁸

We encourage the panel to investigate options for strengthening the recognition of Indigenous rights and interests in the Act. This would need to be conducted in close consultation with Indigenous organisations. Ongoing research and development of governance models through the National Cultural Flows Research Project should be considered. While this research is ongoing, relevant changes and improvements can be made in the act to enable implementation of the Project's outcomes.

Enabling reform is needed to establish a framework for ongoing improvement. Just as the detailed workings of environmental flows had not been determined before the creation of the CEWH, so legislative reform is needed to pave the way for successful implementation of Indigenous water rights and cultural flows.

The Water Act should include a general provision supporting the provision of Indigenous water rights and requiring State and Commonwealth agencies to incorporate Indigenous rights and interests into water resource plans and other relevant processes.

Recommendations

- Include the United Nations Declaration of the Rights of Indigenous Peoples as a 'relevant international agreement' in the Act or associated regulations and ensure that the Act gives affect to this agreement.

- Make necessary changes to the Act to support greater Indigenous engagement in water management and to mandate Indigenous ownership of water resources.
- Consult closely with Indigenous organisations and representative groups including the Murray Lower Darling Basin Indigenous Nations (MLDRIN) and the Northern Basin Aboriginal Nations (NBAN) in the process of the current review.

References:

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- ¹ Murray Lower Darling Rivers Indigenous Network and Northern Basin Aboriginal Nations, 2007. *Echuca Declaration*; and Morgan, M. Strelein, L. and Weir, J (2004) *Indigenous Rights to Water in the Murray Darling Basin: In support of the Indigenous final report to the Living Murray Initiative*. Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Research Discussion Paper, Number 14. Canberra, AIATSIS.
- ² Godden, L and Mahala Gunther, M. 'Realising Capacity: Indigenous Involvement in Water and Policy Reform In South-Eastern Australia', 20 *The Journal of Water Law* 243.
- ³ Morgan, M. Strelein, L. and Weir, J, 2004. *Op cit.* p. 7
- ⁴ First Peoples' Water Engagement Council, *Advice to the National Water Commission*, May 2012.
- ⁵ Morgan, M. Strelein, L. and Weir, J, 2004. *Op cit.* p. 7
- ⁶ *Echuca Declaration. Op cit.*
- ⁷ O'Bryan, Katie. 'The National Water Initiative and Victoria's legislative implementation of Indigenous water rights.' *Indigenous Law Bulletin*, v.7, no.29, Mar-Apr 2012: 24-27.
- ⁸ National Water Commission, 2014, *A review of Indigenous involvement in water planning, 2013*. p. 5. NWC, Canberra. p 5
- ⁹ Morgan, M. Strelein, L. and Weir, J, 2004. *Op cit.* p. 25.
- ¹⁰ Commonwealth of Australia, 2012. *Water Act 2007* Basin Plan, p. 4
- ¹¹ Woodward, E. et al. 2012, 'Utilising Indigenous seasonal knowledge to understand aquatic resource use and inform water resource management in northern Australia', *Ecological Management and Restoration*, Vol 12, No1.
- ¹² Jackson, S. and Langton, M. (2011) 'Trends in the recognition of Indigenous water needs n Australian water reform: the limitations of 'cultural' entitlements in achieving water equity.' *The Journal of Water Law*, Vol 22, 2/3.
- ¹³ First People's Water Engagement Council. 2012. *Advice to the National Water Commission*. p. 9
- ¹⁴ See for example, Jackson, S. and Langton, M. (2011) *Op cit.*
- ¹⁵ Sections 21 and 202. The other 3 mentions of indigenous issues are a basic requirement to include a description of indigenous uses of water in the Basin Plan, and optional appointments to the Basin Committees.
- ¹⁶ In section 21 (4) V. See Macpherson, L, 2008. 'The Limitations of Indigenous Water Rights in the Proposed Murray Darling Basin Plan.' *Right Now*. September

2012. <http://rightnow.org.au/topics/indigenous-people/another-missed-opportunity-indigenous-water-rights-in-the-proposed-murray-darling-basin-plan/>

¹⁷ First People's Water Engagement Council. 2012. *Advice to the National Water Commission*.

¹⁸ First People's Water Engagement Council. 2012. *Advice to the National Water Commission*. p. 18.