

Submission to the review of the *Water Act 2007* (Cth)

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1. Introduction:

For Indigenous people around Australia, water is an essential part of country, culture and identity. Indigenous Australians have been using and managing water for thousands of years, yet their rights and interests in water, and their role in water management continues to be undervalued and remains largely unrecognised in Australia's water management regimes at both State and Federal level.

In addition, the *Native Title Act 1993* (Cth) has proven to be of limited utility in recognising Indigenous use of and involvement in the management of water resources, and similar State based regimes, such as Victoria's *Traditional Owner Settlement Act 2010* (Vic) are also deficient when it comes to adequate recognition of Indigenous water rights.

Australia has signed the UN Declaration on the Rights of Indigenous Peoples ('UNDRIP'),² which supports Indigenous peoples' rights to use, access and manage water resources.³ As a sign of its continuing commitment to the UNDRIP, the Commonwealth government should amend the *Water Act 2007* (Cth) ('the Act') to greater reflect Indigenous rights and interests in water. Below are some suggestions as to how this could be achieved.

2. Section 3 – Objects

An amendment could be made to s 3(c) to include a reference to Indigenous outcomes. An amendment could also be made to s 3(e) to refer to Indigenous uses. Having a reference to Indigenous outcomes and uses contained upfront in the objects of the Act is a signal to the Australian community that Indigenous rights and interests in water are to be valued and respected.

3. Section 4 – Definitions

The definition of 'relevant international agreement' in s 4 could be amended to include the UN Declaration on the Rights of Indigenous Peoples. As noted in the introduction, Australia has signed the UNDRIP, which supports the recognition of Indigenous water rights.

4. Section 21 - General basis on which Basin Plan to be developed

The Murray-Darling Basin is home to over 40 Indigenous nations.⁴ The Murray-Darling Basin Authority ('MDBA') plays a significant role in the management of the Murray-Darling Basin, including the preparation of the Murray-Darling Basin Plan ('MDBP'), and any amendments

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² This occurred on 3 April 2009.

³ See for example Articles 25, 26 and 32.

⁴ The Murray Darling Rivers Indigenous Nations (MLDRIN) currently represents 24 Indigenous nations in the southern region of the Murray-Darling Basin: <http://www.mldr.in.org.au/about-us/> and the Northern Murray-Darling Rivers Aboriginal Nations (NBAN) currently represents 22 Indigenous nations in the northern part of the Basin: <http://nban.org.au/>

and reviews of the MDBP.⁵ The performance of these functions under s 21 requires the MDBA to have regard to Indigenous issues,⁶ however it can be inferred that they are viewed only in terms of public benefits, and do not have a consumptive or economic component. This is a flawed assumption which fails to recognise the holistic nature of Indigenous relationships with water. Section 21(4)(c) should therefore be amended so that Indigenous issues are listed separately.

5. Section 172 - Functions of the Murray-Darling Basin Authority

Section 172 contains a list of additional functions of the MDBA, which could be amended a couple of ways to ensure that Indigenous interests are adequately considered:

- a. Amend s 172(1)(d) to include a reference to Indigenous use and management of the Basin water resources; and
- b. Add a separate function similar to s 172(1)(j) being that the MDBA engage specifically with Indigenous communities about the use and management of Basin water resources.

Currently engagement with Indigenous communities is only implied in the Act by the need for the MDBA to 'have regard to' Indigenous issues in s 21(4)(c), and for the Basin Plan to provide details about Indigenous uses of Basin water resources in Item 1(b) of the table in s 22. This is because in order for the MDBA and the Minister to 'have regard to' Indigenous issues and for the Basin Plan to include information about Indigenous uses of water resources, there must necessarily be input from Indigenous people.

However including specific references to engagement with Indigenous communities and Indigenous use and management of water resources in s 172 of the Act will not only ensure that Indigenous interests will be adequately considered and that Indigenous people are adequately engaged,⁷ but that the wider community is aware that they need to be adequately considered and engaged.

6. Section 178 - Membership of the MDBA

Eligibility for appointment to the MDBA requires a high level of expertise in various fields relevant to the MDBA's functions, those fields being set out in s 178(3). This subsection could be amended to include Indigenous water management as a relevant field. This would recognise the unique and important contribution that Indigenous water knowledge makes to the management of water resources in the Murray-Darling Basin.

7. Basin Community Committee

It is noted that membership of the Basin Community Committee ('BCC') must include 'an individual with expertise in Indigenous matters relevant to the Basin's water resources.'⁸ It must also include a member of the MDBA, and 8 individuals who are water users.⁹ Eligibility

⁵ Section 19.

⁶ Section 21(4)(c)(v).

⁷ There were in fact significant consultations with Indigenous groups in the preparation of the Murray-Darling Basin Plan, facilitated in part by the MDBA's consultation document: *A yarn on the river – getting Aboriginal voices into the Basin Plan*.

⁸ Section 202(5)(c).

⁹ Defined in 202(7) as 'a person who:

for appointment to the BCC is governed by s 204. Pursuant to that section, 'an individual must be nominated by the Murray-Darling Basin Ministerial Council and must have a high level of expertise or interest in: (a) community, indigenous or local government matters relevant to the Basin's water resources.' And pursuant to s 202(3)(c) the BCC must establish 'an Indigenous water subcommittee, to guide the consideration of Indigenous matters relevant to the Basin's water resources.'

There are two points to be made about the BCC. The first is that there is no requirement that the individual appointed to the BCC actually be Indigenous, they must merely be an expert or have an interest in Indigenous matters relevant to the Basin's water resources. Although in practice the individual is very likely to be Indigenous,¹⁰ it would be preferable for this to be specified in the Act itself. This also applies to the subcommittee.

The second point to note is that the Indigenous expert (whether or not they are actually Indigenous) is only one of up to 17 members of the BCC, and at least 8 of those 17 members must be water users, as defined in s 202(7). That definition does not include Indigenous water users. This means that the Indigenous voice on the BCC is likely to be eclipsed by the voices of non-Indigenous interests. It is therefore recommended that membership of the BCC in s 202(5)(c) be amended to allow for at least two Indigenous experts.

8. Conclusion

The current review of the *Water Act 2007* (Cth) provides the Commonwealth government with an ideal opportunity to support the recognition of Indigenous rights and interests in water, and the important contribution that Indigenous Australians can make to the management of Australia's water resources. It should not let this opportunity pass it by.

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- (a) is engaged in irrigated agriculture; or
 - (b) is engaged in environmental water management; or
 - (c) uses water for industrial purposes; or
 - (d) uses stock and domestic water; or
 - (e) is engaged in interception activities with a significant impact (whether on an activity-by-activity basis or cumulatively) on water resources.

¹⁰ Note that the list of current members of the BCC on the MDBA website does not indicate which member is the member with indigenous expertise, or which members are those who are water users, or represent water users.