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

We are the Traditional Owners for the Sovereign Nations of the Northern Murray Darling Basin. Our people and the Basin land and waters have a relationship that spans all time. We have always been here, and will always be here.

We acknowledge our ancestors and elders and their integral role in maintaining healthy, rivers and wetlands and caring for all of the animals and plants, and note the damage that has occurred in their lifetime, and ours, to our natural and cultural heritage.

We are one with our lands and waters, and damage to our Mother Earth is damage to us all, our children, and our children's children.

Our water is our lifeblood, and all of us depend on healthy rivers and wetlands.

Our preferred way is to work together collaboratively to ensure the best for all people, and our environment.

We request that you actively seek our knowledge, as our experiential and observational science is based on many thousands of years living in our Country, through many different climatic regimes. Our knowledge compliments your 130 year scientific measurements and modelling.

We request that you actively seek to protect and respect our cultural law in respect to water, and ensure that you engage in a culturally appropriate way that recognises the expertise of our Elders and Knowledgeholders.

We thank you for the opportunity to make this submission to the Review of the *Water Act 2007 (Cth)*.

Who is NBAN

The Northern Basin Aboriginal Nations (NBAN), with 22 participating Aboriginal Nations, is an independent self-determining Traditional Owner based organisation with a primary focus on cultural and natural resource management in the northern Murray–Darling Basin.

It advocates greater recognition and respect for Aboriginal knowledge and cultural values and uses regarding water and land management in the northern Murray–Darling Basin. NBAN has contributed to the development of the Murray–Darling Basin Plan and will assist the Murray-Darling Basin Authority and the Basin States by providing advice regarding the implementation of the Basin Plan.

NBAN also provides ongoing advice to the National Cultural Flows Planning and Research Committee regarding cultural flows research and the involvement of Traditional Owners in the northern Murray–Darling Basin. Full gatherings of Nation Delegates from our participating Aboriginal Nations occur at least twice annually and our Board meets at least four times annually. NBAN maintains a small office in Acton, Canberra, and is supported by a 9 person Board of Directors and its 4 member Executive.

Summary:

NBAN is of the view that the objects of the Water Act 2007 (Cth) require the Basin Plan, and Water Resource Plans to:

1. Improve recognition of Aboriginal Peoples, and their rights with respect to water and biodiversity;
2. Ensure negotiation with Aboriginal Peoples prior to adoption of Water Resource Plans, or the issuance of further water rights, or development which impacts upon such rights, such as groundwater extracting activities, irrigation development and further dams, including right to veto or negotiate conditions with regard to any such proposal;
3. Facilitate Aboriginal Peoples' ownership of a fair and equitable proportion of commercial and environmental water licences until such time as a separate cultural flow allocation becomes effective;
4. Facilitate delivery of cultural flows;
5. Recognise Aboriginal People's rights to maintain and protect cultural sites, and Cultural Flows;
6. Ensure Aboriginal People's capacity development is invested in as a priority.

Improve Recognition of Aboriginal Peoples rights with respect to Water

1. NBAN submits that the current Basin Plan fails to adequately respect, preserve and maintain Aboriginal Peoples' knowledge of, customary practices, and use of, water as is required by sections 3 and 21(1) of the *Water Act 2007 (Cth)* (**Water Act**). This is an existing requirement, but could be made more express by an amendment to section 21 of the Water Act.

2. The Water Act objects (section 3) provide, relevantly:

“(b) to give effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources) and, in particular, to provide for special measures, in accordance with those agreements, to address the threats to the Basin water resources; and

(c) in giving effect to those agreements, to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes”

3. Section 4 of the Water Act defines relevant international agreements as follows:

*“**relevant international agreement** means the following:*

- (a) the Ramsar Convention;*
- (b) the Biodiversity Convention;*
- (c) the Desertification Convention;*
- (d) the Bonn Convention;*
- (e) CAMBA;*
- (f) JAMBA;*
- (g) ROKAMBA;*
- (h) the Climate Change Convention;*
- (i) any other international convention to which Australia is a party and that is:*
 - (i) relevant to the use and management of the Basin water resources; and*
 - (ii) prescribed by the regulations for the purposes of this paragraph.”*

4. The International Convention on Biological Diversity(‘**CBD**’)¹ importantly provides at Article 8(j) a requirement to:

“respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of

¹ Rio de Janeiro 5 June 1992

such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Recommendation 1 – Amend Water Act and Basin Plan to implement special measures for Aboriginal People to protect water use and management related cultural heritage, including Cultural Flows and places of cultural significance such as Wetlands and Fish Traps

Insert at 21

Insert new Section 21(2)(a)(iii)

“the fact that the cultural rights of Aboriginal People have been adversely impacted, as a result, and require special measures to ensure consistency with relevant international agreements”

5. NBAN recommends that, in order to more consistently give effect to the CBD, such as Article 8(j), there should be an amendment to section 21 of the Water Act, to ensure consistency with how the biodiversity elements of the convention are treated within the Water Act and how the Act treats the cultural rights of Aboriginal Peoples.

Declaration on the Rights of Indigenous Peoples

6. NBAN notes that the Commonwealth has formally recognised the Native Title rights and interests of a number of the members of NBAN, and the Basin Plan clearly acknowledges that the management and use of water interacts with Aboriginal Peoples’ cultural rights.
7. Accordingly, NBAN submits that the Declaration of the Rights of Indigenous People² is relevant to the use and management of Basin water resources, and accordingly the definition of “relevant international agreements” in section 4 of the Water Act should be amended to include it.

² <http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>

Recommendation 2 – Amend section 4 of the Water Act definition of “relevant international agreements”

Section 4 Definition – “relevant international agreements”

Insert new (i) Declaration of the Rights of Indigenous Peoples;

Negotiate with Aboriginal Peoples when Water Planning or Development impacts on their rights

8. NBAN notes Article 8 (j) of the CBD requires Australia to:

“respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”

9. NBAN notes that Section 21(1) of the Water Act requires the Basin Plan to be prepared so as to give effect to the relevant international agreements. Accordingly NBAN submits that the Basin Plan must give effect to Article 8 (j) of the CBD.

10. The Conference of the Parties 7 set out a plan of action to improve implementation of Article 8 (j) by member nations and requires, amongst other things greater adoption and use of the Akwe Kon Principles, which are used for strategic assessments such as the Water Resource Plans, as well as individual developments:

- *Notification and public consultation of the proposed development by the proponent;*
- *Identification of Indigenous and local communities and relevant stakeholders likely to be affected by the proposed development;*
- *Establishment of effective mechanisms for indigenous and local community participation, including for the participation of women, the youth, the elderly and other vulnerable groups, in the impact assessment processes;*
- *Establishment of an agreed process for recording the views and concerns of the members of the indigenous or local community whose interests are likely to be impacted by a proposed development;*

- *Establishment of a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community;*
- *Identification and provision of sufficient human, financial, technical and legal resources for effective indigenous and local community participation in all phases of impact assessment procedures;*
- *Establishment of an environmental management or monitoring plan (EMP), including contingency plans regarding possible adverse cultural, environmental and social impacts resulting from a proposed development;*
- *Identification of actors responsible for liability, redress, insurance and compensation;*
- *Conclusion, as appropriate, of agreements, or action plans, on mutually agreed terms, between the proponent of the proposed development and the affected indigenous*
- *and local communities, for the implementation of measures to prevent or mitigate any negative impacts of the proposed development;*
- *Establishment of a review and appeals process.*

11. NBAN notes that the Conference of the Parties requested governments to use the Voluntary Guidelines and encouraged them to initiate a legal and institutional review with a view to exploring options for incorporation of the guidelines in national legislation and policies. Accordingly NBAN recommends to the Panel that it utilises this review to incorporate the guidelines into the Basin Plan.
12. Water Resource Plans establish the limits and sharing arrangements between water users and other uses, including Cultural use of water, as such they are central to water planning and future development of our water resources.
13. Accordingly, NBAN requests that the Federal Government amend the Basin Plan to ensure that Basin States in preparing the Water Resource Plans must negotiate with Aboriginal Peoples regarding the content of the Water Resource Plans in a manner consistent with the Akwe Kon Guidelines, so as to meet the requirements of section 21(1) of the Water Act.

Recommendation 3 – Amend Basin Plan to ensure Akwe Kon Guidelines apply to consultation

10.53(3) Basin Plan

Insert new (3)

- *Notification and public consultation of the proposed development by the proponent;*
- *Identification of indigenous and local communities and relevant stakeholders likely to be affected by the proposed development;*
- *Establishment of effective mechanisms for indigenous and local community participation, including for the participation of women, the youth, the elderly and other vulnerable groups, in the impact assessment processes;*
- *Establishment of an agreed process for recording the views and concerns of the members of the indigenous or local community whose interests are likely to be impacted by a proposed development;*
- *Establishment of a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community;*
- *Identification and provision of sufficient human, financial, technical and legal resources for effective indigenous and local community participation in all phases of impact assessment procedures;*
- *Establishment of an environmental management or monitoring plan (EMP), including contingency plans regarding possible adverse cultural, environmental and social impacts resulting from a proposed development;*
- *Identification of actors responsible for liability, redress, insurance and compensation;*
- *Conclusion, as appropriate, of agreements, or action plans, on mutually agreed terms, between the proponent of the proposed development and the affected indigenous and local communities, for the implementation of measures to prevent or mitigate any negative impacts of the proposed development;*
- *Establishment of a review and appeals process.*

Cultural Flows and Improve Aboriginal Peoples' capacity to manage Cultural Flows

14. NBAN notes that Aboriginal Peoples have historically been excluded from owning land and water rights due to previous State Government's land and water allocation policies.
15. Accordingly many Aboriginal people have little direct experience with the water regulatory framework, and the operational context of water.

16. NBAN members understand that for the cultural rights with respect to water to be given standing within the water regulatory framework and operational regimes the only mechanism that currently exist are water licences.
17. Although such a system is not congruent with Aboriginal Law and custom with respect to water, it is the current paradigm which operates and accordingly, NBAN is of the view that it is essential that Cultural Flows must be expressed as water licences and shares.
18. NBAN's and MLDRIN, have consistently asked for Cultural Flows to be allocated to Aboriginal Peoples. This cannot be achieved through the Water Act, and must be implemented by each of the States. It can be achieved through State water laws, and Water Resource Plans. It can occur with minimal impact on other users if implemented in the way outlined below.

What are Cultural Flows?

19. At a joint meeting of NBAN and MLDRIN in Echuca in 2010 delegates from 43 Indigenous Nations across the Murray Darling Basin endorsed the following definition: *'Cultural flows' are water entitlements that are legally and beneficially owned by the Indigenous Nations 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*³.
20. Some people have discussed the need to change this term to Aboriginal Flows or Indigenous Flows, NBAN prefers the term Cultural Flows, as it picks up economic as well as environmental, social and spiritual values and importantly, it says why the flow is needed, to maintain Aboriginal People's cultural connection to water and water dependent ecosystems.

What is a Cultural Flow in water terms?

21. NBAN notes and supports the important research being undertaken to define Cultural Flows at particular locations within the Basin. To articulate this for each Aboriginal People, over the entire Basin, will take many years.
22. As an interim step, NBAN requests the Federal Government to encourage State Governments to consider allocating 5% of each Water Resource Plan water entitlements to Aboriginal People as Cultural Flows, with 3% of that water coming

³ MLDRIN (2007) and Echuca Declaration 2010

from the “Environmental water” and 2% from within the SDL allocation (additionally ground water allocations should be made). It is recommended that initially this water comes from water already purchased or recovered by the Commonwealth Government.

23. NBAN submits that further purchases and use costs should be funded on an ongoing basis from a small levy on water trades in the manner used by the NSW Government to fund the Aboriginal Land Rights Act 1983 (NSW). Those funds could be used to purchase licences and establish Aboriginal People’s participation in the water market. An Aboriginal Water Fund could be established to facilitate this.
24. It is recommended that Aboriginal Peoples own and manage this 5% of each Water Resource Area supported by technical advice from the Commonwealth Environmental Water Holder (and ultimately a Cultural Flow Water Holder) and liaise with relevant Traditional Owner Corporations that have been established within each Water Resource Area and NBAN.
25. It is envisaged that the Commonwealth and State Environmental Water Holders would discuss opportunities for the Cultural Environmental Water (3% of Cultural Flow)⁴ to be matched with other Environmental water to optimize environmental and cultural outcomes.
26. Further, the Commercial Cultural Water⁵ (2%) would require technical advice from State water operating authorities.
27. This would establish a practical mechanism for ensuring Aboriginal Peoples’ participation and develop their capacity in water use, management and delivery. It should also provide a solid platform for building partnerships within the Water Resource Plan Areas with industry and stakeholders.

Why are cultural flows needed?

28. **Cultural flows deliver equity and justice.** Aboriginal people were removed from their lands, including lands adjacent to rivers and streams and access denied. Wetlands were drained, fish traps removed, diversions put in place and over extraction, productive billabongs and eel channels were dammed or destroyed, and a great deal of knowledge how to manage water in a variable climate such as Australia was lost or ignored.

⁴ 3% of approximately 14,000 GL(estimated annual environmental water after extraction) 420 GL

⁵ 2% of approximately 10,000 GL(estimated annual extraction) is 200GL (it may be less after the Basin Plan)

29. Under the old English law used in Australia (riparian rights), unless you owned land adjacent to, or land which had access to water such as groundwater, or via an irrigation scheme, you were unable to hold a water licence.
30. When the COAG reforms were implemented in each state, unless a person held a prior water licence or entitlement, they were excluded from owning a new licence under the new water management regime unless they purchased it.
31. Accordingly, Aboriginal people were largely⁶ excluded from owning the new form of water entitlements, or shares and accessing their water dependent cultural places. Aboriginal people should have an equal right to participate in water management and use and should be allocated shares accordingly.
32. **Cultural flows deliver on international commitments.** Sixteen percent of Australia's Aboriginal population live within the Basin and Aboriginal people form a growing number of the Basin residents. We have a human right to our continuing cultural relationship with water which is recognised in a number of International Treaties, including those 'relevant international agreements'⁷ required to be given effect to by the Water Act 2007.
33. An important principle of ESD is "*intergenerational equity*". Aboriginal peoples' (particularly future generations) rights to enjoy their spiritual, cultural and physical relationships with land is now recognised as an important component of intergenerational equity⁸.
34. **Cultural flows deliver remote and regional environmental outcomes, jobs, and economic opportunities to Aboriginal people.** It is current government policy to ensure special measures are deployed to increase health, education and employment outcomes for Aboriginal people, particularly in remote and regional Australia. It has long been recognised that participation in natural resource management and use increases social, economic and health outcomes for Aboriginal people⁹.
35. **What is not included in cultural flow concept?** For the purposes of the Basin Plan, it is assumed that sufficient water of adequate quality will be provided to Aboriginal

⁶ Apart from NSW, (s 3, 5(2) of the Water Management Act 2000, State Water Management Outcomes Plan)

⁷ S 20, and 21 Water Act 2007 Convention on Biological Diversity, Articles 8(j) and 10(c)

⁸ *Anderson v DG DECC* (2006) 144 LGERA 43; [2006] NSWLEC 12 at paragraph [199]

⁹ Janet Hunt, Jon Altman, and Katherine May (2009) Social benefits of Aboriginal engagement in natural resource management" CAEPR (Working Paper 60/2009)

people dependent upon the Basin water resources for drinking water, bathing and other household purposes (including adequate water supply to fight fires and essential recreational needs, critical to social wellbeing) as part of Critical Human Water Needs.

Respect for Aboriginal law, custom and knowledge

36. NBAN refers to the requirements of Article 8(j) of the CBD and notes many Aboriginal Peoples hold an enormous amount of knowledge of Basin water systems, and their interconnectedness. This knowledge is built on many thousands of year's data, during many very different climactic regimes.
37. NBAN is of the view that cultural laws of Aboriginal People and Aboriginal People's knowledge should be respected and given the same amount of investment as is put into managing data which spans the last 130 years of Basin water history.
38. NBAN's members hold oral histories of flood and drought events, and creation stories that are very relevant to water use and management. It is long overdue that such knowledge be invested in, in a culturally appropriate manner that appropriately acknowledges and values the contribution made by the Elders and Knowledgeholders. Current Government funding to the National Cultural Flows Project is uncertain and insufficient to complete this task adequately and comprehensively.
39. The National Water Commission's *"A review of Indigenous involvement in water planning, 2013"*, found that only NSW had advanced the Aboriginal engagement processes in water planning, by establishing the Aboriginal Water Initiative (AWI) which is currently the only Aboriginal Water Unit in the country.
40. The main objective of the AWI is to ensure that there is ongoing and effective state-wide and regional engagement with Aboriginal communities in water planning, and that measurable Aboriginal water outcomes for both environmental and commercial use are achieved and reported upon.
41. NBAN notes that there are many Aboriginal people who have a history of engagement in natural resource management at international, national, state, regional and local levels who have remained engaged despite the rotation of many of the government officials. These Aboriginal people are a critical repository of our corporate memory.

42. NBAN recommends a dedicated and sustained effort to ensure that such knowledge and skills are built upon, and transferred to future leaders of the Aboriginal Peoples in the Basin, which is long overdue.

Recommendation 4 – Invest in Aboriginal Peoples knowledge, law and capacity

Basin Plan 10.54

Insert

A water resource plan must describe how Aboriginal Peoples participation in Cultural Flows will be supported, including allocation of a proportion of licences or shares, and ongoing funding for research and skills development.

Recommendation 5 – Strategic Support for Aboriginal Engagement in Water Planning

It is recommended that the Federal Government encourage States and Territories to establish and maintain dedicated Aboriginal Water Units including employing Aboriginal staff to adequately facilitate the fully informed participation of Aboriginal people in water planning and management.

Conclusion

NBAN submits that any review of the Water Act, and the Basin plan's implementation of the Water Act should:

1. Improve recognition of Aboriginal Peoples, and their rights with respect to water and biodiversity;
2. Ensure negotiation with Aboriginal Peoples prior to adoption of Water Resource Plans, or the issuance of further water rights, or development which impacts upon rights, such as groundwater extracting activities, irrigation development and further dams, including right to veto or negotiate conditions with regard to any such proposal;
3. Facilitate Aboriginal Peoples' ownership of a fair and equitable proportion of commercial and environmental water licences;
4. Facilitate delivery of cultural flows;
5. Recognise Aboriginal People's rights to protect cultural sites, and Cultural Flows;
6. Ensure Aboriginal People's capacity development is invested in as a priority.

This submission focuses on the broad, as yet unmet rights, needs and aspirations of Aboriginal Nations with respect to management of water in their lands. NBAN is available to give the Panel any more information they may require regarding this submission.

NBAN supports the submissions made by the National Native Title Council, the Federation of Victorian Traditional Owner Corporations, the Australian Conservation Foundation and Friends of the Earth.

NBAN acknowledges their Elders who have for many years advocated for the health of their rivers and wetlands, and greater respect for the cultural rights of Aboriginal People with respect to water, and the biodiversity sustained by healthy waterways. NBAN dedicates this submission to the memory of Uncle Roy Barker and Aunty June Barker, who were themselves a union of the northern Basin with the Southern Basin.

NBAN acknowledges the great work of MLDRIN, and NAILSMA and thanks Uncle Mathew Rigney posthumously for his tireless work for the health of the Murray Darling and our People, and in particular, Cultural Flows.

NBAN acknowledges all of those people who continue to work to realise the aspirations of Aboriginal people to meet their rights and responsibilities with regard to water.

Cheryl Buchanan

Chairperson

Northern Basin Aboriginal Nations

30 July 2014