



**SUBMISSION TO THE
MURRAY DARLING BASIN AUTHORITY
REGARDING THE
DRAFT BASIN PLAN**

INTRODUCTION

This is a submission from the Victorian Traditional Owners Land Justice Group to the Murray Darling Basin Authority (MDBA) as part of the Authority's consultation around the Draft Basin Plan (DBP).

The Victorian Traditional Owners Land Justice Group (LJG) is an unincorporated body which provides a voice for each Traditional Owner group in Victoria. Membership is open to representatives from each Traditional Owner group in Victoria and representatives meet frequently. Its aim is to lobby the Victorian Government for improvements to policy, legislation and action to achieve greater land justice for all of the Traditional Owners in the State. The most significant achievement of the Land Justice Group was the passage of the *Traditional Owner Settlement Act 2010 (Vic)*. It has recently made extensive submissions to the Victorian State Government's review of the *Aboriginal Heritage Act*.

The LJG currently has four Co-Chairs - Graham Atkinson, Melissa Jones, Bobby Nicholls and Annette Xiberras. Native Title Services Victoria (NTSV) provides secretariat support to the LJG.

The Land Justice Group currently has representatives appointed from the following groups:

- Gunaikurnai
- Wurundjeri
- Bidawal
- Barapa Barapa
- Waddawurrung
- Boonwurrung
- Dja Dja Wurrung

- Wergaia
- Dhudhuroa
- Eastern Maar
- Taungurung
- Waywurru
- Yupagulk
- Latji Latji
- Wadi Wadi
- Tati Tati/Robinvale
- Gunditjmara
- Goolagin
- Monaro
- Ngintait
- Wamba Wamba
- Wotjobaluk

As will be apparent from this list, many LJG members have traditional lands within the Murray Darling Basin, although some members come from country to the South. Also many LJG members are also members of and active in the Murray Lower Darling Rivers Indigenous Nations (MLDRIN) organisation. All LJG members are represented by NTSV in their land rights struggles.

With this in mind, this LJG submission:

- Expressly endorses the MLDRIN submission on the DBP to the MDBP; and,
- Adopts and endorses the legal analysis and recommendations contained in the NTSV submission to the MDBA regarding the DBP.

However, the LJG also seeks to emphasise the following matters which are traversed in those submissions.

Water in traditional life: Water *is* Life

It should be trite to say, but apparently needs restating that water is the yarn that binds all life together. The rivers, creeks and billabongs of our traditional lands are the life blood of our communities. They provide the food, materials and medicines needed in daily life. They are the birth place and the resting place of the dreaming creatures. They mark the passage of their creation journeys. When our waterways are unhealthy, traditional life withers with them.

As MLDRIN and NTSV say in their submissions waterways are the basis of creation stories, such as the Murray Cod Dreaming story that describes the creation of the River Murray, with many cultural sites such as middens, initiation grounds, tools, fish traps, scar trees or other artefacts being located on or near waterways. Some significant sites may have no observable features but are important for their intangible links to past places of spiritual or ceremonial significance, resources, trade, travel or stories.

Totem species, which connect people to Country and the dreamings which created us all are a critical part of our culture. These species depend on healthy waterways. In some areas, fresh water is also understood to be the final resting place of deceased community members.

Aboriginal people in the Murray-Darling Basin view themselves as an integral part of the river system, with sovereign rights to access and use water, and strong cultural obligations over the management of the resource itself. Aboriginal law along the Murray River recognizes that each Aboriginal community is interconnected and has a responsibility and right to ensure that the waters flow through to the end of the system, allowing each group to meet their cultural obligations to care for their own Country.¹

Cultural responsibilities also extend to include the protection of significant sites located along river banks, on and in the river beds, and sites and stories associated with the water and natural resources located in the rivers and their tributaries; knowledge associated with water and water places; and the ability to access water to undertake cultural activities.² The implementation of these responsibilities are informed by cultural principles that have been developed and tested over a long historical period, and have sustained the cultural, social, spiritual and economic life of Traditional Owner communities.

The DBP must support, not threaten, traditional life

Just as water supports traditional life, so threats to water can threaten traditional life. Climate change, drought, land use change, and mismanagement and over-allocation of water have significantly decreased the availability and quality of water resources. The decrease in water resources negatively impacts on Traditional Owners' ability to enjoy their rights and fulfil their cultural and customary responsibilities. In short, threats to healthy waterways are threats to traditional life itself. The DBP must involve a reversal of this process. The DBP process must lead to changes in law and policy that recognise Traditional Owners as legitimate beneficiaries of water policy as well as accommodating the effects of demographic and land use change.

The current legal and policy framework does not adequately recognize the water rights and interests of Traditional Owners, nor their cultural obligations for its management. This is largely because Indigenous and non-Indigenous perspectives of water and its management differ greatly. This creates difficulties as non-Indigenous laws and management plans

¹ Ngarrindjeri Regional Authority (2010). Submission to the Murray Darling Basin Authority.

² *National Native Title Report* (2008) pg. 172

separate land from water and generally regard water as a resource available for economic gain. As water is predominantly considered only for its consumptive value, its use and regulation is limited and restricted by governments to industries or individuals willing to pay the highest price. This affects Aboriginal access and usage.

Current water policy has been designed to benefit government, industry and agriculture. Protection of the environment, in particular as it affects sites of significance to Traditional Owners are considered secondary to the interests of states, territories and industry stakeholders in most instances,³ and since colonisation Traditional Owners have had very little opportunity to benefit from the waters that they themselves have secured and managed over thousands of years, for future generations.⁴

Even with the existence of laws protecting Aboriginal and Torres Strait Islander people's cultural heritage in all states, territories and the Commonwealth (eg. the *Aboriginal and Torres Strait Islander Protection Act 1984* (Cth) gives preservation and protection to areas or objects in Australian waters that are of particular significance to Indigenous peoples), they have to fight for recognition, protection and a role in resource management.

The NTSV submission discusses the status of water rights in native title law. It sets out that status of Indigenous water rights, particularly native title water rights remains unresolved and limits Indigenous peoples' access and allocation to water resources. In enacting the *Native Title Act 1993* (NTA), the High Court held that the common law of Australia recognizes a form of native title that reflects the entitlement of the Indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands.⁵ However, while the NTA specifically contemplates the recognition and protection of native title rights and interests in inland waters,⁶ they must be capable of being recognised by the common law. Given that the common law does not recognise ownership of water, the courts will not recognise a native title right to 'own' [or to 'speak for'] water.

The current legal and policy framework had become so unresponsive to the environment that it has itself shaped the population pressures and land use throughout the Basin. Aboriginal Nations in the Murray Darling Basin have noted the impact of these changes to water resources since colonization, primarily as a result of the diversion and manipulation of water flows through irrigation development and water storages.

The result is that the Basin no longer functions according to ecological principles alone and relies predominantly on western scientific knowledge, legal instruments and political (institutional) arrangements to meet the needs of all human stakeholders, as well as land, water and biodiversity assets and resources. History has shown that this situation presents enormous risks to Aboriginal culture and the state of the environment.

³ *National Native Title Report* (2008) pg. 29.

⁴ *National Native Title Report* (2008) pg. 207.

⁵ *Native Title Act* (1993) Preamble pg 2.

⁶ *Native Title Act* (1993), s223, s225 and s253.

As set out in the MLDRIN and NTSV submissions the highest risks to the environment are associated with:

- Connectivity of habitat and waterways (including surface and groundwater);
- Functioning of wetland systems and floodplains;
- Abundance and distributions of flora and fauna; and
- Frequency, intensity and location of fire, and a range of threatening processes such as salinity and pest plants and animals.

The highest risks to Aboriginal Nations are associated with:

- The ability to exercise traditional rights;
- The ability to fulfil cultural responsibilities;
- The ability to pursue social and economic interests
- Exposure of culturally sensitive sites and burial grounds from decreased water levels.

The Environment and Culture

While Indigenous values for water have historically been described through a cultural and social lens, it must be recognised that Traditional Owners hold quite distinct environmental and economic values for water resources for the purposes of conservation and natural resource management, and community development.

Australian public policy objectives for water, and the environment more broadly, are closely aligned with those of Aboriginal Nations in the MDB, as the health of the land and its waterways are integral to cultural health. Establishing legal authority over water and having clear roles and responsibilities in water resource governance is also important to fulfilling cultural obligations to managing water appropriately in their traditional lands. Cultural flows are required, separate from and additional to environmental flows, to ensure culturally sensitive and water-dependent sites are managed effectively into the future.

Rights to water for economic, development or commercial use have been scarce or non-existent to date, and are at the whim of government. Aboriginal Nations, in pursuit of their own community development goals are seeking legal authority to take water from a water body and to retain the benefits of its use for these purposes.

It is also important that the outcomes and standards achieved in the MDB process reflect accountability to international, national and state statutory requirements on water law and policy and the cultural principles and practices of Nations and Traditional Owner groups.

Water and Human Rights

In accordance with human rights principles, Indigenous peoples must be actively engaged in all levels of management and decision-making that directly or indirectly impacts their livelihoods and communities. Effective participation in decision making about water

resources is essential to ensuring non-discriminatory treatment and equality before the law.⁷

The Australian Government has ratified a number of international human rights instruments, including the *UN Declaration of the Rights of Indigenous Peoples* (UNDRIP), *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and the *Convention of the Elimination of all forms of Racial Discrimination* (CERD). As an example, under the ICCPR Indigenous peoples' special connection to land and waters is protected under international law which provides for the right to practice, revitalise, teach and develop culture, customs and spiritual practices and to utilise natural resources.⁸

As a signatory to such instruments, the Australian Government has an obligation to its citizens, including Aboriginal and Torres Strait Islander peoples, to respect, protect and fulfill the rights contained within them. The current MDB process is an important opportunity for the Australian Government to implement, in a practical and equitable way, the principles contained within these instruments. It is an opportunity to recognize that Aboriginal relationships with water are holistic; combining land, water, culture, society and economy. Consequently water and land rights, the management of resources and native title are inseparable.

General response from MLDRIN to the Plan

The LJG specifically endorses the following aspects of the MLDRIN Submission and the recommendations which arise from that submission as set out below:

The Aboriginal Nations that comprise MLDRIN have been deeply engaged in water issues and the MDB process for some time. In general terms, there are 4 major areas where the MDB Plan is seen as either deficient or at odds with the aspirations of Traditional Owners. These are as follows:

1. The Draft MDB Plan fails to recognise the sovereign rights of Aboriginal people to water. It is fundamentally unjust to prioritise the protection of existing historical entitlements over the equitable redistribution of water resources according to ecological, human and Indigenous rights principles. Failure to change this approach will undermine the potentially significant social and land justice outcomes that could be achieved through this process.
2. The credibility of the data and analysis with which the draft MDB Plan is based is undermined by the conflicting scientific opinion. Aboriginal people will have greater confidence in the plan once traditional ecological knowledge has been better captured and incorporated into the process.

⁷ *Native Title Report* (2008) pg 208

⁸ *International Covenant on Civil and Political Rights*, arts. 1, 27; *International Covenant on Economic Social and Cultural Rights*, arts, 15; *Declaration on the Rights of Indigenous Peoples*, arts 11-13

3. The draft MDB Plan fails to guarantee an appropriate and implementable flow allocation for the protection and management of Indigenous cultural values.
4. The draft MDB Plan does not provide for culturally appropriate representation of Aboriginal people as decision-makers in water resource management.

The recommendations that follow are based on the case for stronger inclusion of Aboriginal knowledge, experience and views; and the issues highlighted in the general MLDRIN response to the MDB Plan. The Land Justice Group also supports the specific amendments proposed to text, language, definitions and emphasis outlined in the MLDRIN submission.

Recommendation #1: Recognise the full extent of water rights for Aboriginal people in the Basin

- 1.1 Water rights for Aboriginal people must be a priority, at least equal to those of other key stakeholders such as irrigators, and sufficient to enable the fulfilment of cultural rights and responsibilities.
- 1.2 Distinct water rights and allocations should be provided for cultural, economic and environmental purposes. At a minimum, Indigenous water rights should include and account for separate cultural, and economic water allocations, and where water management is being conducted by Indigenous peoples on behalf of the government, in distinct environmental water allocations.
- 1.3 Cultural flows must be detailed in the plan, be informed by Aboriginal cultural principles, and include elements of quantity, quality, frequency and delivery. Cultural flows must be separate and distinct from all other flows (no other stakeholders have their entitlements linked to environmental outcomes), with Traditional Owner management responsibility.
- 1.4 The Plan needs to outline the infrastructure requirements to deliver cultural flows and commit to putting them in place.
- 1.5 The question of Aboriginal Sovereignty in the Murray Darling Basin needs to be addressed by the highest level of government, and include all lands, mineral resources, surface and groundwaters, airspace and natural resources. The option of progressing through negotiated treaties must be considered.

Recommendation #2: Include specific objectives and outcomes for Aboriginal people

- 2.1 Given the transformative potential of water rights for Aboriginal communities within the Basin, and given the Commonwealth, State and Territory commitments to the Closing the Gap policy agenda, it is both appropriate and necessary to include specific objectives and outcomes for Aboriginal people that are aligned with the Overcoming Indigenous Disadvantage Framework and relevant State and Territory frameworks (eg. Victorian Indigenous Affairs Framework). The objectives should include those for cultural flows, as well as economic and social outcomes and their relationship to health and well-being benefits.

Recommendation #3: Recognise the cultural and environmental importance of floodplains

3.1 The Plan must include detailed provisions and accreditation for Floodplain Resource Plans.

This is because floodplains are a critical element of resource security for Aboriginal people in the Basin, providing economic benefits in relation to trade, subsistence benefits from food and the ability to undertake traditional practices. Ecologically, the wetting of floodplain soil releases a surge of nutrients, those left over from the last flood and from the rapid decomposition of organic matter that has accumulated since then. Microscopic organisms thrive and trigger a rapid breeding cycle for larger species. Opportunistic feeders such as birds also move in to take advantage. The surge of new growth endures for some time.

Recommendation #4: Do not shift important responsibilities to the states

4.1 Do not allow the States to issue licenses for exploiting groundwater resources.

The poor condition of the Basin and its resources is in large part the result of inadequate and inappropriate water resource planning by the States over the past 100 years. Allowing the States to allocate groundwater licenses is a dangerous way to mask the inadequate management of surface water resources within the Basin. Scientific knowledge of groundwater recharge processes and water dynamics across regional and local aquifer systems is in its infancy and there is a considerable risk to the system as a whole to allocate large quantities of groundwater without a detailed understanding of the consequences.

For Aboriginal people, the tracks and sites of Dreaming significance link surface and subsurface water sources,⁹ and reducing groundwater flows prevent water spirits from travelling from one point to another, thus impacting on river health.¹⁰

4.2 Do not permit the States to have discretion in how they conceptualise and allow for cultural flows. Doing so will create uncertainty and potential division across the different jurisdictions.

Recommendation #5: Government collaborates with Aboriginal Nations to consolidate, protect and incorporate traditional ecological knowledge into water resource management processes

5.1 Generated from tens of thousands of years of practice and observation, cultural knowledge should be recognised as a science in its own right.

5.2 A knowledge management framework that outlines Aboriginal cultural and intellectual property rights, protocols for access and use and information management systems needs to be developed with Traditional Owners in the Basin

5.3 The full and equal participation of Traditional Owners in all government funded water research and investigations on Country needs to be guaranteed.

⁹ R. Gould 1969 'Subsistence Behavior among the Western Desert Aborigines of Australia', *Oceania*, 39, 4, 253-74.

¹⁰ Draft MLDRIN submission to the Murray Darling Basin Plan (2012).

5.4 The Plan needs to allocate resources and commit to a process of identifying sites of cultural importance across the Basin through cultural mapping.

Recommendation #6: Cultural principles and traditional knowledge must be used to inform management priorities and methodologies in the Basin

6.1 The approach to water resource management therefore must include a commitment to:

- a holistic, system-wide approach to river, tributary and wetland restoration
- ensuring adequate water quality and flow at the end of the river system
- ensuring flows are adequate to maintain the function of floodplains and other water dependent ecosystems
- ensuring adequate water quality and flow to significant cultural places
- a resilience approach managing future further threats and risks to the Basin

6.2 Water resource plans must explicitly include the views, values and priorities of Aboriginal Nations, in particular with respect to cultural flows.

Recommendation #7: Traditional Owners must have the authority and opportunities to participate at all levels of water resource governance

7.1 Aboriginal Nations in the Basin must be notified of relevant water resource planning processes, and have the opportunity to participate in their development in line with the principles outlined below in recommendation 8.2.

7.2 The MDBA must set benchmarks for accreditation of State basin plans that reflect Aboriginal Water needs.

7.3 Aboriginal Nations in the Basin must have a decision-making role in the approval processes for State and local water management plans.

7.4 Aboriginal peoples must be supported to play a more active and visible role in water resource management, in line with their rights and responsibilities.

Recommendation #8: The Australian governments commit to a partnership approach with Aboriginal Australians to water management in the Basin

8.1 It is acknowledged that the management of water must meet broad National interests. There needs to be formal mechanisms in place for Government, farmers, irrigators, Aboriginal Nations and Traditional Owner Groups to come together to discuss issues affecting the Basin.

8.2 An Aboriginal participation framework in water policy that includes national principles for engagement with Aboriginal peoples¹¹ needs to be developed and implemented. Principles for engagement with Aboriginal peoples include:

¹¹ *Native Title Report* (2008)

- The adoption of, and compliance with, the principle of free, prior and informed consent;
- The protection of Aboriginal interests, specifically access to traditional lands, waters and natural resources and ecological knowledge;
- The protection of Aboriginal areas of significance, biodiversity, and cultural heritage;
- The protection of Aboriginal knowledge relevant to climate change adaptation and mitigation strategies;
- Access and benefit-sharing through partnerships between the private sector and Aboriginal communities;
- Non-discrimination and substantive equality; and
- Access to information and support for localised engagement and consultation.

8.3 The role of MLDRIN needs to be made clearer and formalised in the Plan, including representation on:

- All monitoring and evaluation bodies
- All decision-making bodies that provide approval and accreditation of water resource plans
- Relevant State and regional committees
- Board of the Murray Darling Basin Authority.

This is considered important because regulation of resources by States and Territories in the past has significantly marginalised Indigenous peoples from water policy development and implementation. However, as the evidence suggests Indigenous peoples in some areas are asserting rights to their water country by accessing government funding programs and navigating their way through the myriad of legislation and regulation. Indigenous groups such as MLDRIN and the Northern Murray Darling Basin Aboriginal Nations (NBAN) are also developing their own water focused entities to facilitate engagement in water policy and planning.¹² These groups need to be adequately supported by Government.

¹² *Native Title Report* (2008) pg.198