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21 April 2023

Inspector-General of Water Compliance
Department of Climate Change, Energy, the Environment and Water
GPO Box 3090
Canberra ACT 2601

Re: Inspector-General of Water Compliance's (IGWC) Regulatory Policy Discussion Paper (March 2023)

Murray Lower Darling Rivers Indigenous Nations (MLDRIN) welcomes the opportunity to provide comments on the IGWC's Regulatory Policy Discussion Paper.

About MLDRIN

MLDRIN is a representative confederation of over 20 sovereign First Nations from the Southern Murray-Darling Basin (MDB). MLDRIN has led progress in the recognition of First Nations water rights in the MDB and across Australia since its establishment in 1998. Notably, MLDRIN developed the formative Echuca Declaration in 2007, defining the concept of Cultural Flows, which is now recognised in Australian law and policy.¹ MLDRIN was also a partner in delivering the National Cultural Flows Research Project, defining pathways for First Nations water planning and access.² Through the Basin Plan,³ MLDRIN has a formal role to assess Water Resource Plans (WRPs), prepared by Basin States, against set requirements in the Basin Plan. Accordingly, since 2018 MLDRIN has led the assessment of nearly 20 WRPs across South Australia (SA), Victoria, the Australian Capital Territory (ACT), and New South Wales (NSW), engaging Traditional Owners from across these regions.

MLDRIN has engaged with the interim and current Inspector-General(s) on various occasions over recent years to highlight issues of relevance and concern to our membership. We share priorities of integrity and truth-telling in the Basin's water management, and ensuring all agencies and individuals behave and make decisions lawfully.

It is from this position that MLDRIN submits the following comments in response to the Discussion Paper.

¹ For example, *Basin Plan 2012* (Cth) cl 10.54, see also ch 13 pt 6 sch 1 para 31.

² See National Cultural Flows Research Project webpage <<https://culturalflows.com.au/>>.

³ *Basin Plan 2012* (Cth) ch 10 pt 14 legal note.

Comments on the Discussion Paper

First Nations have been systematically excluded from access to water resources and water policy and decision making in the MDB since colonisation. Most notably this is evident in the extremely low rates of water ownership and access amongst First Nations in the MDB.⁴ It is also evident in the broad exclusion of First Nations rights, interests, and objectives from the legislative and policy framework that guides water resource management in the MDB.⁵

Substantive measures to recognise, protect, and advance the rights and interests of the First Nations people of the Basin are largely absent from the Commonwealth's legislation and policy framework which empowers the IGWC's functions and powers. For example, the objects of the *Water Act 2007* and the management objectives for the *Basin Plan 2012* fail to explicitly address the water-related cultural and spiritual values of First Nations and the intricate and enduring web of rights and responsibilities which have informed First Nations management of Basin water resources over hundreds of generations. One key exception to this omission is the requirements stipulated under Part 14 of Chapter 10 of the Basin Plan which sets out obligations on Basin States to consider the views of First Nations on a range of matters relating to the preparation of WRPs.

There is growing community recognition and expectation of the need for reforms in law, policy, and practice to better recognise First Nations substantive and procedural water rights. Provisions of the *Water Act 2007* and *Basin Plan 2012* have not kept up with evolving community expectations and best practice. The need for reform of MDB water management frameworks has been expressly acknowledged in major reviews and inquiries including findings from:

- The Productivity Commission's Inquiry into National Water Reform (2021).⁶ For example, Finding 9.1: "Much more needs to be done to include Aboriginal and Torres Strait Islander people's interests in water in jurisdictional planning and the management of water. Slow progress against commitments made in the 2004 National Water Initiative, coupled with the contemporary context including the National Agreement on Closing the Gap and wide support for action, warrants recognition of Aboriginal and Torres Strait Islander people's interests in water in the overarching goal of a renewed National Water Initiative, and inclusion of both a dedicated objective and new element" (p. 125).

⁴ MLDRIN and NBAN, *Research into how much water is held by First Nations and Traditional Owner organisations in the Murray-Darling Basin in 2020: A First Nations summary* (2021) <https://www.mldrin.org.au/wp-content/uploads/2021/07/1342_MILDRIN-16pp-Report-Lana_v3-min-1.pdf>.

⁵ See, for example, Sue Jackson, Rene Woods and Fred Hooper, 'Empowering First Nations in the governance and management of the Murray-Darling Basin' in Barry Hart et al (eds), *Murray-Darling Basin, Australia: Its future management* (Elsevier Inc.) 323; Carina Whyborn et al, 'The politics of adaptive governance: water reform, climate change, and First Nations' justice in Australia's Murray-Darling Basin' (2023) 28(1) *Ecology and Society* 4. <<https://doi.org/10.5751/ES-13641-280104>>; Jessica Weir, *Murray River Country: an Ecological Dialogue with the Traditional Owners* (Aboriginal Studies Press, 2009).

⁶ Productivity Commission, *National Water Reform 2020: Inquiry Report* (No. 98, 28 May 2021) <<https://www.pc.gov.au/inquiries/completed/water-reform-2020/report/water-reform-2020.pdf>>.

- The MDBA's most recent review of the Basin Plan (2020).⁷ For example, Recommendation 9: "First Nations, Basin governments and the MDBA should develop a practical pathway for the use of water for cultural and economic outcomes" (xvi).
- The findings of the SA MDB Royal Commission (2019)⁸ including "The Water Act and Basin Plan are unclear about the policies underpinning their specific references to matters relevant to Aboriginal people in relation to Basin water resources, despite there being clear obligations in relevant international agreements, and despite developments in native title law. Without precise policy objectives aimed at achieving legal recognition of their cultural needs and interests in water resources, Aboriginal people rightly feel that their interests have been marginalized" (pp. 63-64), and, "The Basin States must commit greater effort to understanding and making provision for Aboriginal people to play a more central role in water resource management" (p. 64).

These examples point to the need to reform water law, policy, and practice to improve the recognition and accommodation of First Nations rights across the Basin at all jurisdictional levels. Indeed, we are starting to see a growing appetite for policy and program initiatives among governments in this regard.⁹ This includes recognition at the MDBA scale, with its planning and preparation for the 2026 Basin Plan review currently anchored around four questions including, importantly, "How can the Basin Plan be improved to recognise First Nations' values in water management and enhance their involvement?"¹⁰

MLDRIN appreciates that the IGWC does not create or change Commonwealth or Basin State policies or laws. Nonetheless, this is the authorising environment in which the IGWC must perform its functions and exercise its powers. MLDRIN's representation is that, in developing its regulatory policy, the IGWC should interpret the current framework establishing his powers and responsibilities to inform a proactive role in holding all relevant agencies to account regarding the recognition, protection, and advancement of First Nations rights and interests relating to water. We implore the IGWC to prepare and uphold an innovative Regulatory Policy that is based on an inclusive, rather than a narrow and reductive, approach to interpreting and applying the Basin water management laws. That is, the absence of explicit inclusion is an opportunity to elevate and create more space for First Nations, and should not be treated as grounds to further exclude or marginalise. This would be consistent with contemporary Australian values and expectations.

⁷ MDBA, *The 2020 Basin Plan Evaluation* (MDBA publication number: 50/20, 2020) <<https://www.mdba.gov.au/sites/default/files/pubs/bp-eval-2020-full-report.pdf>>.

⁸ *Murray-Darling Basin Royal Commission* (Final Report, 29 January 2019) <<https://cdn.environment.sa.gov.au/environment/docs/murray-darling-basin-royal-commission-report.pdf>>.

⁹ Victorian Department of Environment, Land, Water and Planning, *Water is Life: Traditional Owner Access to Water Roadmap* (2022) <https://www.water.vic.gov.au/__data/assets/pdf_file/0035/599390/Water-is-Life-Section-A-Victorian-Government-Policy.pdf>; NSW Department of Planning, Industry and Environment, *NSW Water Strategy* (PUB20/882, August 2021) <https://water.nsw.gov.au/__data/assets/pdf_file/0007/409957/nsw-water-strategy.pdf>; 'New or Varied Targets', *Closing the Gap* (Web Page) <<https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap/7-difference/b-targets/new-varied>>.

¹⁰ MDBA, *Corporate Plan 2022-23* (MDBA publication number: 10/22, 2022), 12 <https://www.transparency.gov.au/sites/default/files/reports/2022-23_murray-darling_basin_authority_corporate_plan.pdf>.

MLDRIN agrees with the approach to a ‘principle–based exercise of powers’ outlined in the Discussion Paper. We argue that this approach authorises the IGWC to fill a critical gap in the MDB space, by proactively identifying and seeking to uphold the rights and interests of First Nations who have been marginalised by settler-colonial water management frameworks. MLDRIN agrees with the principles outlined at page 27 of the Discussion Paper. In particular, MLDRIN stresses that the principle of ‘Improve’, focused on driving innovation and improvement in the management of Basin water resources in the national interest, necessitates a proactive and progressive approach to ensuring that the rights and interests of First Nations, as rights holders who have been marginalised from water access and decision making, are upheld. MLDRIN suggests that anything short of a proactive approach risks failing to address evolving First Nations and broader Australian community expectations.

In implementing a proactive approach to the Regulatory Policy that addresses First Nations marginalisation from water management, the IGWC should consider the following.

First Nations rights and interests as part of the ‘National Interest’

The Discussion Paper emphasises the IGWC’s focus on managing Basin water resources and outcomes in the National Interest. As the First People of the continent that is now known as Australia, with connection and knowledge of scarce water resources passed down from generation to generation since time immemorial, the protection and advancement of First Nations water rights and interests is undeniably part of the National Interest. The IGWC should consider how agencies recognise, protect, and advance First Nations rights and interests as core to a national interest focus.

International Agreements

In implementing International Agreements, the Commonwealth should honour and address all relevant components relating to First Nations and relevant decisions and directives of the Conference of the Parties (COP). As part of a proactive policy, the IGWC should identify the obligations relating to First Nations that flow from the Commonwealth’s ratification of agreements, including particularly the Ramsar convention and Convention on Biological Diversity (CBD). The IGWC needs to monitor compliance with relevant provisions of agreements as well as with resolutions of the COP. Of particular importance is monitoring water management activities to ensure consistency with Article 8(j) of the CBD, which requires the parties 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.”¹¹ Likewise, resolutions of the COP for the Ramsar convention have recommended strong roles for First Nations in co-management of Ramsar wetlands and recognition of cultural values of wetlands,¹² which the Australian state must uphold.

¹¹ *Convention on Biological Diversity* art 8(j) <<https://www.cbd.int/traditional/>>.

¹² *7th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands*, Res VII.8 Guidelines for establishing and strengthening local communities and Indigenous people’s participation in the management of wetlands (10-18 May 1999); *9th Meeting of the Conference of the Parties to the Convention on Wetlands*, Res IX.21 Taking into account cultural values in wetlands (8-15 November 2005).

In complying with these International Agreements, the IGWC should take a proactive and intentional approach to ensuring that Commonwealth and Basin State agencies' responsibilities regarding the protection and enhancement of cultural values and knowledge relating to waterways and wetlands are properly enforced.

Water Resource Plans

The IGWC is responsible for enforcing compliance with WRPs. Noting that WRP requirements are one of the few components of the Basin water planning framework that explicitly address First Nations rights and interests, MLDRIN emphasises that the IGWC must ensure that provisions of WRP relating to First Nations' outcomes are enforced when undertaking his regulatory powers. In doing so, though, MLDRIN sees there are several core issues and questions that the IGWC will need to clarify and wrestle with. We offer these comments particularly in response to the 'Request for feedback' textbox on page 23 of the Discussion Paper, seeking input about gaps.

First, we invite more detail about how the IGWC will monitor and enforce jurisdictions' compliance with their WRPs. This clarity relates to (a) the process of monitoring including roles for First Nations contributors, (b) mechanisms and tools to measure performance and compliance, and (c) types of consequences that jurisdictions can face upon findings of non-compliance. These questions are particularly important in relation to jurisdictions' WRP provisions and statements that relate to First Nations matters such as those responding to Chapter 10 Part 14 of the Basin Plan. In our experience, these provisions are often vague and therefore, we expect, will likely be difficult to measure progress against i.e., commitments often do not follow any of the 'SMART' principles (specific, measurable, achievable, realistic, and timely). Such a challenge should not deter the IGWC from evaluating these provisions which must be treated as serious compliance matters comparable to others in WRPs. Rather, we make this observation here to highlight the need for intentional and upfront thinking and planning. Relatedly, we hold questions about how the IGWC will hold jurisdiction accountable upon finding evidence of jurisdictions not complying with their First Nations WRP elements.

Second, relates to the statement in the Discussion Paper that 'the Inspector-General intends to adopt a risk-based approach to enforcement and will reflect this in his regulatory policy' (p. 21) including in the relation to WRP compliance. It will be important to spell out what a 'risk-based approach' means in a practical and applied sense. This includes exploring how such an approach will be informed by First Nations' views and interests given these tend to be excluded or overlooked by technocratic risk assessment processes. MLDRIN recommends such an approach be developed through co-design with First Nations to ensure that it is ground-truthed and appropriate.

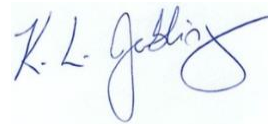
With our experience from partnering with local Traditional Owners and/or First Nations to examine and interrogate Chapter 10 Part 14 provisions in WRPs across southern Basin jurisdictions over the last 5 years, MLDRIN is well placed to contribute to the IGWC's thinking about and working through these matters. As mentioned in previous correspondence, we would welcome a role in co-designing and developing suitable assessment and/or management strategies.

Concluding comments

Increasingly, we are finding that Basin water management agencies are presenting positive and supportive narratives about their work with and involving Traditional Owners and/or First Nations in the public domain (media, reports, and stakeholder forums). Unless the audience works closely with grassroots First Nations communities, it would be easy to form the belief that agencies are working towards substantial progress collaboratively with First Nations. The reality is that First Nations continue to be marginalised and misrepresented. MLDRIN strongly supports the IGWC's emphasis on truth-telling, integrity, transparency, and accountability. This is not only very welcome, but essential for advancing First Nations water justice in the MDB. We would welcome the opportunity to discuss these matters with you further.

MLDRIN invites conversations with the IGWC in the near future to ensure First Nations' views and perspectives are core to its work. Should you wish to discuss any points in this submission, please contact me. Otherwise, we look forward to examining the draft Regulatory Policy when it is available later in 2023.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'K. L. Jobling', is written over a light blue rectangular background.

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