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**Indigenous Rights to Water in the Murray  
Darling Basin**

In support of the Indigenous final report to the  
Living Murray Initiative

Monica Morgan, Lisa Strelein and Jessica Weir

NUMBER 14

Indigenous Rights to Water in the Murray Darling Basin  
In Support of the Indigenous Final Report to the Living Murray Initiative

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## **Executive Summary**

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### **Indigenous Nations of the Murray – first and last**

The Indigenous Nations were the first peoples of the Murray, the first managers, the first to earn their livelihoods, and the first to congregate and recreate on the river. Because of their asserted sovereignty through law and spirituality, they are contemporary custodians and they will likely be the last people to leave the Murray. This relationship places Indigenous Nations of the Murray in a unique situation as interest holders.

### **Shared interests in a healthy river**

The Murray Darling Rivers Indigenous Nations (MDRIN) (or ‘Indigenous Nations’) share the vision of the Murray Darling Basin Commission (MDBC) for a healthy, living river with natural flows and cycles, sustaining communities and preserving unique values.

In the current context, the difficult task of determining how best to manage the scarce water resources of the Murray River cannot ignore or avoid the inherent rights of the Indigenous Nations to these water resources and the surrounding ecosystem.

### **Non-discrimination principle**

The *Racial Discrimination Act 1975* (Cth) (RDA) provides protection for Indigenous peoples’ individual and collective rights. The RDA creates an obligation on governments to deal with Indigenous interests in a non-discriminatory manner, and governments and agencies must exercise their power to deal with property in a manner consistent with the RDA.

Failure to do so now may be predicted to cause future potential delays, lack of certainty in decision making and may possibly result in structural impediments to transparency and certainty in decision making

Equal treatment in this context must take into consideration the equal enjoyment of rights as citizens, particular interests as Indigenous peoples and the history of discrimination. Specific measures may be required to ensure the standard required by the RDA is met.

### **Reparations and compensation**

Compensation is a remedy of last resort in relation to Indigenous peoples' traditional lands and waters. Only where it is impossible to protect or return lands should compensation be considered, and then, it should be considered in the form of land and waters before monetary compensation.

### **Outcomes and mechanisms**

#### ➤ *Sustainability and the precautionary principle*

The precautionary principle should be applied when making decisions on the impact of returning water to the environment. The implications of failing to return health to the river has a disproportionate impact on the relationship of Indigenous peoples' with the Murray as it is linked to their cultural and spiritual identity and their status as first peoples of the Murray River.

#### ➤ *Indigenous priority in water allocation: a cultural flow*

Section 211 of the *Native Title Act* provides a precedent for the prioritisation of Indigenous rights to natural resources second only to environmental and scientific research concerns. Indigenous peoples are entitled to seek such a priority in the future allocation of water resources. The allocation of water rights should consider the environmental flow and the cultural flow, arguably on a Nation by Nation basis, before commercial or other economic interests.

#### ➤ *Water allocation rights*

For the Indigenous peoples of the Murray River, water resources are an opportunity for developing rural industries. Water allocation rights can mean inclusion in the water trading environment for economic development opportunities, or for achieving cultural and environmental objectives by allocating water for cultural or environmental flows.

The allocation of water directly to Indigenous Nations and/or local Indigenous communities is the most appropriate model. A generic water trust or provision for affects on native title rights and interests would be unlikely to achieve the objectives of self-management and economic development.

➤ *Co-management*

Co-management of water resources and the natural and cultural heritage of the Murray River provides a mechanism for negotiating responsibilities to water. MDRIN have proposed a co-management model that would see Cultural Heritage Management Protocols negotiated separately with each Indigenous Nation, working under an umbrella agreement for the region. Parts of the river could become protected areas for the purpose of restoring native fish and vegetation.

**Understanding the diversity of Indigenous interests**

The distinction between the ‘community of Traditional Owners’ and the ‘local Indigenous community’ is complex. Traditional owners are not always members of the local Indigenous communities that exist on their traditional country, and not all members of those local Indigenous communities are traditional owners. These different communities of interest must be appropriately represented in the decision-making processes of the MDBC.

**Procedural rights: the right to be engaged in decision-making**

More than consultation, Indigenous peoples have called for substantive involvement in policy and decision-making, as well as direct involvement in environmental management. In international

law, a measure of whether Indigenous peoples enjoy equal rights in respect of effective participation in public life is to ensure that ‘no decisions directly relating to their rights and interests are taken without their informed consent’. Informed consent requires more than mere consultation, it requires meaningful roles in the process and power in determining the decisions and outcomes.

➤ *Self-determination: Indigenous peoples rights as first peoples*

Within Australia as a whole, Indigenous peoples hold a special status as the first peoples of this land. Their status as first sovereigns necessitates that they be distinguished from other minorities by virtue of their distinct histories as political entities. At its heart, the call for recognition of the right to self-determination concerns the nature of engagement between Indigenous peoples and government

➤ *Indigenous governance and internal authority*

Indigenous people have their own rights and obligations under Indigenous law and custom in the Murray River. The laws of Indigenous Nations regulate the transmission of property rights, access to land and waters, responsibilities relating to land and waters, use of resources, and a myriad of other rights, responsibilities and community controls.

Imposed structures of governance can undermine the integrity of Indigenous Nations internal authority structures and destabilise the outcomes of engagement. There is a role for government to play in resourcing the development of Indigenous governance arrangements in a manner that is responsive to the needs and aspirations of specific Indigenous groups for self-sufficiency and self-determination.

Meeting the principles of the COAG Reconciliation Framework through investment in permanent structures of engagement can lead to efficient policy development and meaningful outcomes built on sound human rights principles.

**Substantive rights: Indigenous Nations as owners and custodians**

Apart from the procedural mechanisms to ensure meaningful involvement of Indigenous Nations in decision-making and management, specific measures may be introduced to recognise substantive rights or specific interests that arise from Indigenous ownership and custodial responsibilities, including:

- Access land and waterways;
- Use and enjoyment of the natural resources;
- Hunting, fishing and foraging; and
- Protection of cultural heritage and identity.

Australian governments have a responsibility to recognise and protect the distinct enjoyment of such rights by Indigenous people in order to protect activities that are central to cultural survival.

Indigenous rights to fish in the Murray Darling Basin are recognised by the Commonwealth *Native Title Act*, and by New South Wales and Queensland state legislation. Indigenous people also have hunting and gathering rights under most national parks legislation.

➤ *A right to water*

Indigenous rights to onshore waters are part of a holistic system of land and water management. This holistic system has been fractionalised and encroached upon by European systems of land and water management, and by the accompanying environmental impact.

In order to enjoy other rights, such as fishing rights, it is first critical to have access to a healthy river system. Where water rights are to be separated from land, Indigenous peoples' interests in the access use, enjoyment of those waters should be adequately protected.

➤ *The right to economic development*

It is well accepted that societies of the Murray Darling actively participated in redistribution networks that provided reciprocal

rights of access to each others land and resources, that these commodities were exchanged for other goods of value and prestige and that the resources and minerals of the land were owned by specific individuals and groups. Indigenous people have been marginalised from this economic base, and have a right to be included in the economic benefits derived from the heritage of their natural resource management. As rights holders and traditional owners, Indigenous Nations have the right to share in the benefits that may result from the use of their traditional lands, resources and knowledge.

### **The right to protect cultural heritage and identity**

A central concern expressed in the *Living Murray* consultations was that current catchment management practises are not considering the cultural knowledge of the Indigenous Nations. Indigenous Nations and knowledge holders have expressed a desire to share this knowledge in the management of their traditional country.

This willingness to share knowledge must be measured against a concern to control access and use of knowledge, including language. The right to protect cultural knowledge extends beyond knowledge about specific places, and protecting those places. Indigenous Nations seek to maintain the ownership of intellectual and cultural property and any commercial advantage that may be derived from their use.

#### ➤ *Relationships with particular species of flora and fauna*

Indigenous Nations will emphasise the cultural and spiritual importance of particular species, many of which are at risk or have abandoned their traditional country. The relationship with such species requires protection and revitalisation.

#### ➤ *Sites of significance*

As property rights holders, the Indigenous Nations have a right to control access to sites, places areas and objects of significance, a right to protect unauthorised or inappropriate use of such sites and

places, and a right to control and manage the transfer of cultural knowledge about these places. This may involve the management of flows and effects of flooding.

### **The right to equal enjoyment of human rights**

Indigenous people should be guaranteed equal enjoyment of human rights, such as health, housing, and access to clean water. Clean water access is critical for health in all communities; in Indigenous communities lack of supply of clean water is linked to high morbidity and mortality rates.

Unlike the broad rural demographic trends of rural-to-urban decline and an ageing population, Indigenous Nations are staying on their land, and Indigenous Nations and Indigenous communities have growing, young populations. Supporting these Indigenous communities is integral to the support of the socio-economic viability of rural Australia.

Overcoming historical disadvantage in the provision of services and infrastructure and the future development of growing local Indigenous communities and Nations should be incorporated into planning objectives.

### **Recognition in domestic legislation and policy**

The exercise of the rights and responsibilities under Indigenous law is rarely supported by express recognition within the non-Indigenous legal system. However, state land rights regimes, customary fishing and hunting reservations, and of course the *Native Title Act* have either explicitly or implicitly acknowledged the fact of Indigenous occupation of traditional country and the continuing cultural authority of those communities.

#### ➤ *Australia's International obligations*

The Australian government has ratified international human rights instruments such as the Covenant on Civil and Political Rights, and the Convention on the Elimination of Racial Discrimination. This ratification creates positive obligations on governments to

guarantee the enjoyment of human rights. It also establishes benchmarks for best practice, particularly for Commonwealth Agencies, Governments and intergovernmental processes.

➤ *Native title*

Native Title is based on the sovereignty of Indigenous Nations and the rights to land and waters that predate the assertion of sovereignty by the British and continued after the colonisation of the continent with the recognition and protection of the common law.<sup>1</sup> The *Native Title Act* refers to the 'land and waters' as a single proposition. Determinations of native title have similarly undifferentiated land and waters in the determination area and successful determinations have listed access to water or water related rights.

However, recent cases have restricted the number of Indigenous peoples who will have access to native title as a means to protect their inherent rights or to enforce their traditional laws. The wholly or partially extinguishing effects of historical tenures will be particularly devastating for Indigenous peoples of the South East of Australia.

The extent of extinguishment and the limits that have been built into the legal doctrine of native title suggest that native title should not be the only benchmark for the engagement of Indigenous Nations.

➤ *Land and water legislation*

Responsibility for the control and management of inland waters and waterways rests primarily with the States. While the Commonwealth Parliament does not have an express power to make laws for the regulation and management of inland waters, increasingly State and Territory laws and policies in relation to waters are being guided by international law and national policies. The principal forum in which these national policies are developed and implemented is through COAG.<sup>2</sup>

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1 (1992) 175 CLR 1, p. 60 per Brennan J.

<sup>2</sup> Indigenous Rights to Water Report: Lingiari Report to ATSIC, draft.

Only the New South Wales and, to a lesser extent, the Queensland legislation contain provisions dealing with distinct Indigenous interest in waters (*Water Management Act 2000* (NSW), *Water Act 2000* (Qld)). This lack of legislative recognition is reflected in the water allocation plans currently being developed or implemented in most Australian jurisdictions.

## Background

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This Discussion Paper was developed in response to the direction from the Ministerial Council meeting 33 – 9<sup>th</sup> May:

*Council requested further consideration by the Commission of issues raised by traditional owners, including Indigenous interests in water, and indicated its intention to review the implications at its November 2003 meeting.*

The Discussion Paper draws on the outcomes of the Indigenous peoples' consultations with the Murray Darling Basin Commission (MDBC) as part of the *Living Murray Initiative*. This Paper seeks to place the views and aspiration expressed in those documents within a broader Indigenous rights context. While this paper often focuses on the Murray River as an engagement with the *Living Murray Initiative* many of the issues raised are relevant to both the Murray and Darling Rivers and more broadly.

### **Engagement with the MDBC**

As part of the MDBC's vision for sustaining communities in the Murray Darling Basin, the Commission has been engaging with Indigenous communities, and consulting with the Murray Darling River Indigenous Nations (MDRIN).

The MDRIN confederation includes the traditional owner groups Wiradjuri, Yorta Yorta, Snowy Mountain Nations, Barapa Barapa, Wamba Wamba, Muthi Muthi, Nyampa, Latji Latji, Wadi Wadi, Wergaia, Barkanji, and Ngarrinjeri. MDRIN is a discrete group of Indigenous Nations within the Murray Darling Basin.

The Indigenous Nations have sought engagement with governments and agencies about the health of the rivers and their rights in relation to the surrounding environment for generations. MDRIN was formed in 1999 as a confederation of traditional owner groups to provide a coordinated approach to policy

development and management of the rivers. As a result of this ongoing engagement, a Memorandum of Understanding is currently being negotiated to recognise the unique relationship between the Commission and the Indigenous Nations.

The Indigenous Action Plan being developed by the Commission seeks to implement the Council of Australian Governments' (COAG) Reconciliation Framework and integrate its principles into the management of the Murray Darling Basin.

The *Living Murray Initiative* has run a parallel community consultation process with the diverse Indigenous Nations and Indigenous communities who assert association with the Murray River to gauge their responses to the *Initiative*, and to feed into the work of the MDB Ministerial Council.

➤ *The Living Murray Initiative and COAG projects*

The *Living Murray Initiative* examined:

- the social, cultural, economic and environmental benefits and costs of returning water to the environment
- issues concerning the recovery and management of environmental flows; and
- mechanisms to manage and monitor the impacts of any decisions

This work is inextricably linked to the Council of Australian Governments' Water Reform Agenda, which introduced private rights in water, and the MDBC water trading pilot. Water has now been separated from land as a property right. State governments have the power to determine allocations of water and to regulate trading of water within their jurisdictions.

➤ *The Indigenous Response to the Community Engagement*

In response to the community engagement process surrounding this work, the Report of the *Indigenous Response to the Living Murray Initiative* identified five central themes:

- ***A shared vision:*** While recognising the diversity of views among Indigenous Nations and local communities, as well as the different perspectives from various state governments and non-indigenous communities, Indigenous peoples of the Murray seek a shared and integrated vision for a healthy river;
- ***Recognition:*** The report seeks recognition of the status of Indigenous Nations as peoples, and of their inherent rights to exercise their culture and sustain their communities on their traditional lands;
- ***Respect for country:*** The environmental health of the Murray is prioritised in the Report as it is integral to the cultural social and economic health of Indigenous communities;
- ***Involvement:*** Throughout the report Indigenous peoples emphasised their desire to be actively involved at all levels of management of water and other natural resources on their traditional lands; and
- ***Policy change:*** Indigenous peoples also proposed specific changes to policies central to the *Living Murray Initiative* as well as a general change in approach toward a cultural and natural resource model.

➤ *The Indigenous Rights Discussion paper*

MDRIN and the MDBC sought assistance from the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) to prepare this report. An expert roundtable was convened at AIATSIS on 15 August 2003, and the views and opinions raised by the expert panel contributed to this Discussion Paper.

The Round table consisted of:

Assoc Prof Donna Craig	Centre for Environmental Law, Macquarie University
Marg Donaldson	Native Title Unit, HREOC

Dr Sandra Panell	Rainforest CRC James Cook University
Dr Michelle Cochrane	Centre for Aboriginal Economic Policy Research, ANU
Glen Kelly	WA Native Title Working Group
Paul Kauffman	ATSIS - Land Water and Economic Development Division
Wieslaw Lichacz	ATSIS - Land Water and Economic Development Division
Dr Graham Henderson	MD, AIATSIS VRF-Social Health
Dr Peter Veth	AIATSIS, President Association of Consultant Archaeologists
Stuart Bradfield	AIATSIS, VRF- Native Title and Agreement Making
Monica Morgan	MDBC
Wendy McIntyre	MDBC
Liz McNiven	MDBC
Kevin Goss	MDBC
Dr Lisa Strelein	AIATSIS Manager, Native Title Research Unit
Jessica Weir	Centre for Environmental and Resource Sciences ANU

AIATSIS and the expertise that was gathered for the roundtable are committed to providing continuing support beyond this Discussion Paper to bring greater research and expertise to bear on the decision-making and outcomes development processes of MDRIN and the MDBC. A second expert roundtable was held on 5 December 2003, with participants from the first roundtable and additional expertise from:

Michael Bissell	Minerals Council
Derek Walker	MDBC Ministerial Council CAC
Marcia Langton	University of Melbourne

Lisa Palmer	University of Melbourne
Louise Rose	MDBC
Warwick McDonald	MDBC
Donna Oxenham	AIATSIS Visiting Scholar
Tony Bauman	AIATSIS Visiting Research Fellow
Patrick Sullivan	AIATSIS Visiting Research Fellow
Jane Anderson	AIATSIS Visiting Research Fellow
Michael Davis	Consultant

Recognition of Indigenous peoples' rights in relation to the natural and cultural heritage and economies of the rivers is the first step in enabling the Murray Darling Basin Commission, the Ministerial Council and the governments involved to support the Indigenous Nations and communities' desire to foster a partnership model for cultural and natural resource management that can provide a leading example for Australia.

## **Indigenous Nations of the Murray – first and last**

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Indigenous Peoples of Australia have an inherent relationship with their traditional country. As the original owners, they have never relinquished sovereignty over or connection to their lands and waters. Indigenous peoples have unique rights in the lands over which they have traditional custodianship which inhere in the very meaning of Aboriginality.

Indigenous peoples' relationship with the land is more than a random coincidence of presence and use. This relationship involves an ancient history with the land and unique systems of law, custom and spirituality that regulate land and water management.

The Indigenous Nations are the traditional owner groups of the Murray Darling River Basin. As self determining autonomous entities, they each make decisions based on their traditional affiliations between family groups which are connected and united through language and kinship lines.

Each Indigenous Nation occupies a core area of land on either one or both sides of each major watercourse, which can overlap with and share with the country of an adjoining Indigenous Nation. Each Nation has a unique connection to their particular stretch of river that is sourced in their creation story and is governed by their distinct tradition, laws and customs.

The ability to continue to exercise collective rights to enjoy and benefit from the natural resources of their lands and waters, must be maintained for the future of each Indigenous Nation. Their interests in the Murray go deep into their identity as an identifiable people.

The interconnectedness between humanity and the environment as a holistic entity is the essence of Indigenous peoples' culture, spirituality and life. The health and recovery of the rivers' ecosystems and Indigenous Nations' access to it is central to the

spiritual, cultural, social, and economic survival of the Indigenous Nations of the Murray.

The Indigenous Nations are the first peoples of the Murray Darling Basin, the first managers, the first to earn their livelihoods the first to congregate and recreate on the rivers. Because of their cultural connection through law and spirituality, they remain the contemporary custodians and they will likely be the last people of the Murray Darling Basin. This relationship places the Indigenous Nations in a unique situation as interest holders.

The permanency of the relationship held between Indigenous peoples and their land and environment creates the imperative for a radical reconsideration of the management of the rivers in a manner that respects the intergenerational connection between Indigenous peoples and the Murray Darling Basin, including: protecting the environment for future generations of the Indigenous Nations; respecting the rights of the Indigenous Nations to use and draw their livelihood from the rivers; and incorporating the Indigenous Nations into decision-making

## Shared interests in a healthy river

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The Indigenous Nations of the Murray share the vision of the Murray Darling Basin Commission (MDBC) for a healthy, living river with natural flows and cycles, that sustains communities and preserves unique values. Similarly, all Australians have an interest in protecting Indigenous heritage. Indigenous heritage is part of Australia's heritage and its protection and maintenance benefits the whole of the Australian community.

Indigenous people are an integral and integrated part of the social, cultural and economic communities of the region. Many communities and individuals hold land in the region and are often a substantial part of the population of towns and regional centres. Their contribution is important to the maintenance of services and infrastructure in regional areas.

The interdependence of Indigenous people and the broader community ensures that there are many shared interests and objectives:

- Indigenous people are part of the *social community* of the Murray River, and seek to improve the health of the river for social outcomes, from recreation through to clean drinking water for towns and communities.
- Indigenous people as residents and users of the Murray River are part of the *economic community*; the river has long maintained their traditional lifestyles across their country and the modern economic life of Indigenous Nations, as it has supported the economies of the irrigators and farmers and the towns that have developed around such industries.
- Indigenous people have a shared interest with the *environmental community* to restore the natural river environment. The degradation of the Murray River has restricted the ability of Indigenous people to manage their land and water resources in a manner that can be sustained for future generations.

The Indigenous Nations share interests with the Commission itself as the governments' appointed custodian of the river.

Indigenous custodianship of the region necessitates an integrated and holistic approach to river management.

The Indigenous Nations support the view of the MDBC that the health of the Murray River cannot be addressed by protecting individual rivers and catchments; an integrated whole of Basin approach is needed. While recognising the inherent diversity of the Indigenous Nations, the formation of Murray Darling Rivers Indigenous Nations (MDRIN) assists in achieving this ‘one Basin’ approach.

- That the issues, concerns, values and aspirations of Indigenous people be placed on the Issues Log of the broad community engagement process and be considered by the MDBC and the Ministerial Council.

*Recommendation from the Indigenous Response Final Report*

## **Understanding the diversity of Indigenous interests**

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The diversity of Indigenous interests in the Murray Darling Basin was raised in a 2003 study by the MDBC. The MDBC saw the need for this Scoping Study to advise them on the barriers and constraints to engaging with Indigenous Peoples in natural resource management decision making and the integration of Indigenous cultural heritage considerations into relevant Murray Darling Basin Commission Programs.

### **Two Constructs of Indigenous ‘Community’**

Chapter Four of the Scoping Study elaborates on the importance of “*Two Constructs of Indigenous Community*” for natural resource management decision making:

- *it is important for government policy [to be] conceptually clear about how to aim for Indigenous involvement that is relevant to the two different constructs of Indigenous community. Involvement by Traditional Owners is critical to cultural heritage protection and the broader aspirations for recognition of Indigenous rights and responsibilities towards lands and waters.*
- *That in natural resource management and cultural heritage decision making, it is appropriate that agencies pay most attention to effective involvement of Traditional Owners, (also known as Indigenous Nation), because only they can speak for Country. Efforts must focus on negotiating and building strong partnerships with the Traditional Owners.*

In distinguishing traditional owner groups as the focus of negotiations over land management, the report seeks to redress pre-existing assumptions about the nature of consultation with the Indigenous people in relation to the Murray Darling Basin. The report highlights the need to distinguish between consultations and outcomes required to address the needs of the local Indigenous community and the particular obligations to Indigenous Nations.

➤ *Local Indigenous Communities*

A local ‘Indigenous community’ comprises all the Indigenous people who live within a general locality or region. Involvement of this community is relevant to the broad social issues that governments have to redress in terms of Indigenous socio-economic disadvantage.

The term ‘Indigenous Community’ denotes a homogenous set of people who do not necessarily hold any traditional affiliations to the particular lands and waters on which they now reside. In the Murray Darling Basin there are few places where a majority of the population is Indigenous, so this ‘local Indigenous community’ is usually a subset of the broader community of the locality or region.

The majority of ‘local Indigenous communities’ are constructed through an affiliation to Indigenous community based organisations, holding membership based on democratic decision making processes similar to that of the broader society. Their core functions are in advancing the welfare of Indigenous people, usually by providing housing, health and other associated services.

These organisations were formed from a desire to promote the enjoyment of inherent and fundamental human and citizenship rights for Indigenous people equal in standard to those already taken for granted in the broader Australian society.

➤ *Traditional Owners, Communities or Indigenous Nations*

The concepts of traditional owners, communities or Indigenous Nations are concepts not dissimilar to ‘native title group’ as defined in the *Native Title Act*, in that these concepts encompass all the Indigenous people who have rights and responsibilities for lands and waters under their own customs and traditions.

They hold rights of inheritance that are unique to their territory and are recognised under their traditional laws and customs as

having spiritual, cultural and physical connection to the land. They also have responsibilities to care for homelands within their traditional boundaries. These rights are held in common as collective rights.

➤ *Distinguishing Between Indigenous Nations and Local Indigenous Communities*

The distinction between the ‘community of Traditional Owners’ and the ‘local community’ is complex, and it can be very hard for people outside these communities to be clear about how they operate in practice. Traditional owners are not always members of the local Indigenous communities that exist on their traditional country, and not all members of those local Indigenous communities are traditional owners.

The customary rights of the Indigenous Nations in the Murray Darling Basin relate to cultural self-determination and the preservation of distinctive cultural identities. With respect to questions of land and natural resource management, the Indigenous Nations hold particular interest in the governance structures that manage land and waters.

## Placing consultations in a human rights context

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International human rights have assisted Indigenous peoples by providing a language in which expectations can be articulated in terms familiar to non-indigenous people. These expectations extend from protecting and promoting the rights of Indigenous people as individuals but also to respecting group rights and the distinct collective rights of Indigenous peoples. It also extends to the concept of recognition the need to confront a history of discrimination and dispossession. The language of rights has informed many Indigenous statements of their interests in processes and management structures, particularly in relation to land management.

While the predominant philosophy behind the international human rights regime is one of individual rights, the International Human Rights Covenants and Conventions do contain rights of particular relevance to Indigenous peoples. The Covenant on Civil and Political Rights (the ICCPR) recognises, in Article 27, the rights of minorities to enjoy their own culture, religion and language. The Convention on the Elimination of Racial Discrimination (CERD) also contains particular articles, such as Article 5, which refers to the right to own and inherit property, including in association with others.

More fundamentally, each of the Human Rights Covenants, at Article 1, affirms the right of all peoples to self-determination.<sup>3</sup> This right was also one of the founding values of the United Nations and is contained in the UN Charter, article 55 among its key purposes. Self-determination and the equal enjoyment of human rights are seen as the corner stones of international community.<sup>4</sup>

The UN Human Rights Committee has used Article 27 to confirm the distinct enjoyment of rights by Indigenous peoples in order to

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<sup>3</sup> The right of all peoples to self-determination was also included in the United Nations Charter, among the purposes of the United Nations.

<sup>4</sup> The Charter, at Article 55, places self-determination of peoples together with the principle of equal rights as the basis for international peace and stability.

protect activities central to their cultural survival.<sup>5</sup> The Human Rights Committee has made clear that Article 27 protects issues of cultural importance such as the relationship of Indigenous peoples to their lands and waters. Moreover, protection of those rights may require ‘positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them’.<sup>6</sup>

Similarly, in 1997, the CERD Committee reaffirmed the application of the provisions of CERD to Indigenous peoples and asked States to include reference to them in their periodic reports. They reaffirmed the duty upon states to preserve and promote Indigenous cultural identity, to guarantee freedom from discrimination, to provide culturally appropriate and sustainable economic and social development, to provide effective political participation and the right to exercise Indigenous culture and language.

The Recommendation again singled out the relationship with land calling on State parties to protect the rights of Indigenous peoples to ‘own, develop, control, and use their communal lands, territories and resources’ and to ensure that ‘no decisions directly relating to their rights and interests are taken without their informed consent’. Further, State parties should take steps to return traditional lands, or where this is not possible to provide just, fair and prompt compensation, preferably in the form of lands.<sup>7</sup> These principles extend to the right to access and exploit their natural resources and particularly to protect and use waters.

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5 *Kitok v Sweden* UNDoc CCPR/C/33/D/197/1985 (1988); *Ominayak v Canada* UNDoc A/45/40 (1990) vol. 2 at 1; *Lansmann v Finland* UNDoc CCPR/C/52/D/511/1992 (1994); and *Lovelace v Canada* UNDoc CCPR/C/OP/1 (1988). See Pritchard, *Native title in international perspective*, op. cit., pp. 45-7 and Douglas Sanders, ‘Collective rights’, *Human Rights Quarterly*, vol. 13, 1991, pp. 379-80.

6 General Comment 23 (1994) paras 6.2, 7 UN Doc HR1/GEN/1/Rev1(1994), p. 40. See Pritchard, *Native title in international perspective*, op. cit., p. 45. See also Michael Dodson, *Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report Jun 1994-Jul 1995*, AGPS, Canberra, 1995, (ATSISJC 1995), p. 13.

7 Committee on the Elimination of Racial Discrimination, General Recommendation XXIII (51) concerning Indigenous Peoples, adopted at the

Australia has also ratified the United Nations Convention on Biological Diversity (1992) which places obligations on governments to reserve and protect Indigenous knowledge, innovations and practices in relation to biodiversity, including ensuring equitable benefit sharing arrangements.

The Human Rights Committee has stated that resource allocation is a central aspect of the right to self-determination. In relation to minority rights, the Committee on the Elimination of Racial Discrimination has called on State parties to:<sup>8</sup>

- recognise and respect Indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Indigenous origin or identity;
- provide Indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;
- ensure that Indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs and to preserve and to practise their languages.

These human rights instruments have been ratified by the Australian government. This ratification creates positive obligations on the Governments to guarantee the enjoyment of

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Committee's 1235th meeting, 18 August 1997 (UN Doc CERD/C/51/Misc.13/Rev.4), paras 1-2, 6.

<sup>8</sup> Pages 52, 2001 HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner Social Justice Report.

human rights. It also establishes benchmarks for best practice, particularly for Commonwealth Agencies, Governments and intergovernmental processes.

## Recognising the rights of Indigenous peoples

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### Self-determination: Indigenous peoples rights as first peoples

Indigenous Nations engaged in the *Living Murray* consultative process have expressed their desire to be respected as peoples, with a right of self-determination.<sup>9</sup> Self-determination can be understood as a statement of the appropriate way to respond to the aspirations of Indigenous peoples. Alternatively, it could be said to be a description of the nature of the process for attaining outcomes. In international instruments it is expressed as the right of peoples to ‘freely determine their political status and freely pursue their economic social and cultural development’. At its heart, the call for recognition of the right to self-determination concerns the nature of engagement between Indigenous peoples and government.

Within Australia as a whole, Indigenous peoples hold a special status as the first peoples of this land. Their status as first sovereigns necessitates that they be distinguished from other minorities by virtue of their distinct histories as political entities. At the time of Federation, a vast majority of the continent remained under Indigenous governance. Nevertheless, Indigenous peoples were excluded from the self-governing communities that came together to form the Commonwealth.<sup>10</sup>

Indigenous peoples in Australia have distinctive rights and a status based on prior and continuing occupation of land and waters, and authority and autonomy as distinct polities. Indigenous peoples’ contemporary identity is a window into and reflection of their past which shows strong threads of continuity and the survival of their distinct political, social, cultural and economic identity.

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<sup>9</sup> Indigenous Response to the Living Murray Initiative 2003, Final Report, p. 5

<sup>10</sup> See generally, Michael Dodson and Lisa Strelein, ‘Australia’s nation building: Renegotiating the relationship between Indigenous peoples and the State’, *UNSW Law Journal*, Centenary of Federation Special issue, vol. 24(3) 2001, pp. 826-839.

➤ *Indigenous governance and internal authority*

Indigenous people have their own rights and obligations to the Murray River under Indigenous law and custom. The laws of Indigenous Nations regulate the transmission of property rights, access to land and waters, responsibilities relating to land and waters, use of resources, and a myriad of other rights, responsibilities and community controls. The Indigenous Nations continue to assert and exercise these rights and responsibilities.

How an Indigenous Nation defines their laws and customs and how they relate these into communal, group or individual rights is the key to developing processes that for making decisions relating to their interests both within and outside of their lands and waters.

***2001 Social Justice Report***

*Indigenous groups and communities should be free to pursue self-determination and self-government through the governance arrangements they find most appropriate to their circumstances. They should not be limited to whatever policy prescriptions for 'self-determination', 'self-reliance', or 'participation' are in vogue but be able to determine what forms of representation, structures and processes are suitable to their particular group's needs and distinct characteristics.*

*Human Rights and Equal Opportunity Commission  
("HREOC") Aboriginal and Torres Strait Islander Social  
Justice Commissioner, p. 97*

In discussing the concept of internal authority Noel Pearson articulates that:

*Communally held titles necessarily have an internal and external aspect or dimension. That is, a group title necessarily has rules that governs the internal allocation of rights and interests amongst members of the group, and it has an external dimension; what*

*the title amounts to vis a vis strangers, the outside world.*

The Indigenous Nations are governed by an autonomous body of norms that can not be subject to any comparison with that of another Indigenous Nation or European legal system.

The internal structure or framework is reflective of traditional laws which are communal in nature, it is the customs or rules of the Nation which dictate the extent to which any individual, family lineage or other sub group has rights to possess and use lands and resources vested in the entire Indigenous Nation.

The external structure or framework is reflective of how the Indigenous Nation asserts their rights to the outside world on the possession and use of their lands, waters and natural resources using instruments of any State, Territory, national or international systems of law.

Internal governance and the freedom to develop structures that are appropriate to the circumstances of the group are essential to Indigenous peoples' exercise of self-determination. The Indigenous Nations have often been disadvantaged by having to construct or adjust governance structures to respond to government programs or policies.

The 2002 Social Justice Report reflects on the dilemma:

*In the face of growing interest within the Australian context and the potential for increased Indigenous governance and capacity-building, it is important not to lose sight of the place of the exercise of traditional rights and culture and the need for any new governance arrangements to be covered by recognition of the jurisdictional responsibilities, distinct rights and status of Indigenous peoples<sup>11</sup>*

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<sup>11</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Human Rights and Equal Opportunity Commission (HREOC), p. 97

Each Indigenous Nation faces enormous pressures in interpreting these rights and interests under traditional customary law into the legal, political and administrative structures of the Australian colonial system.

The key issue is to identify and develop strategies that retain Indigenous peoples' integrity within these two systems. Here the Social Justice Report suggests there is a joint responsibility in which governments can play a role:

*...there is a role for government to play in resourcing the development of any new Indigenous governance arrangements including a case for the centralised transfer of resources to communities in regions by Commonwealth agencies for the purposes of community development and increased governance. The conditions for receipt of any transfer of resources should in turn be responsive to the needs and aspirations of specific Indigenous groups for self-sufficiency and self-determination.<sup>12</sup>*

- That the MDBC proceed with the three-stage Indigenous Engagement Project detailed in the Feasibility Study and provide necessary resources
- That the MDBC provide a forum for Indigenous Nations to come together to determine their position on natural resource management issues and continue to provide support for MLDRIN in this respect

*Recommendations of the Indigenous Response Final Report*

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<sup>12</sup> *ibid.*

## The right to be engaged in decision-making

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Perhaps the most recurrent theme throughout the *Living Murray* consultations was Indigenous peoples' desire to be involved in the *Living Murray* deliberations. It was also clear that Indigenous peoples desired to have ongoing engagement with the Commission. In asserting rights and interests that go beyond mere consultation, Indigenous peoples have called for substantive involvement in policy and decision-making, as well as direct involvement in environmental management.<sup>13</sup>

Effective political participation is a central element of self-determination at international law. The CERD Committee, in recent criticisms of the Australian government, stressed the importance of process in relation to the right of political participation as essential to non-discrimination.<sup>14</sup>

The requirement for states to engage with Indigenous peoples at this level should not be dependent upon formal structures for legal recognition such as native title, but extend to all policy decisions that impact upon Indigenous peoples access to and use of traditional territories.<sup>15</sup>

Reiterating their General Recommendation XXIII,<sup>16</sup> the Committee has recognised that a measure of whether Indigenous peoples enjoy equal rights in respect of effective participation in public life is to ensure that 'no decisions directly relating to their rights and interests are taken without their informed consent'.<sup>17</sup> This is a high benchmark. It requires more than mere consultation.

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<sup>13</sup> Indigenous Response to the Living Murray Initiative 2003, Final Report p. 6.

<sup>14</sup> Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia – Concluding observations/comments*, 18 March 1999. Un Doc CERD/C/54/Misc.40/Rev.2.

<sup>15</sup> Awas Tingni

<sup>16</sup> CERD GR XXIII (51), HRI/GEN/1/Rev.5, 18 August 1997

<sup>17</sup> CERD Decision (2)54, op.cit., para 9. The Committee held that this standard was not met by Australia in relation to the *Native Title Amendment Act 1998* (Cth).

Environmental and resource management decisions should be made in active consultation with the Indigenous Nations, and the consultation is not just informing people of decisions and impacts. Measures should give consideration to whether the Indigenous Nations themselves are able and willing to implement appropriate measures themselves.<sup>18</sup>

- That the Ministerial Council and the MDBC receive a delegation from Indigenous Nations to allow discussion of the issues

*Recommendation of the Indigenous Response Final Report*

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<sup>18</sup> See the Canadian decision of *R v Sparrow* [1990] 1 SCR 1075.

## Indigenous peoples as owners and custodians

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The Indigenous Nations assert a right and a responsibility to be involved in environmental and resource management programs concerning their country. The lands and waters of Australia are critical to the survival of Indigenous peoples' distinct cultures and communities. Measures for the protection and recognition of Indigenous peoples' rights in land and waters are based on their unique relationship with the land and waters; such measures are necessary to ensure the enjoyment of the fundamental rights of Indigenous peoples to their land and waters, culture and identity.

The holistic approach to land and claims to rights over country has meant that the Indigenous Nations of the Murray have not found it necessary to articulate their rights to waters separately when speaking of 'country'. This has been understood by governments who regularly include the terms land and waters together in their interpretation of Indigenous rights to 'country'.<sup>19</sup>

The separation of water from land in the current water reforms requires Indigenous people to now articulate their rights to waters separately in a language which governments can understand in the context of the property system.<sup>20</sup> The Indigenous Response lists, among other things, the following current uses and customary obligations:

- Access to drinking water;
- Fishing;
- Collecting food, fibre, medicines and other sustenance;
- The responsibility to pass on unpolluted water down stream.
- The right to protect cultural knowledge;
- to pass knowledge on and provide cultural education;
- to protect and access particular sites and species; and
- to maintain song lines and story lines involving the river;<sup>21</sup>

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<sup>19</sup> See *Native Title Act 1994* (Cth) use 'land or waters' throughout.

<sup>20</sup> See comments from Justice Sundberg in relation to the 'unbundling' of Indigenous peoples' rights over country: *Neowarra v Western Australia* [2003] FCA 1400 (8 December 2003)

<sup>21</sup> Final report, Attachment 1: Consolidated Community responses.

The Final Report of the Indigenous Response to the *Living Murray Initiative* argues that to fully respect the river and adjoining systems, the mouth of the River Murray should be open. This can only occur if the needs of the river are respected – which effectively means increasing natural flows, bringing back native fauna and flora and eradicating introduced species.

### **Rights to water**

Water is central to the survival of Indigenous peoples in Australia. Indigenous peoples' survival depended upon knowledge of the both the episodic and seasonal behaviour of the creeks and rivers, reliable water holes, and the availability of swamps, springs and soaks.<sup>22</sup> Careful management of the natural resources of the Murray meant that food would be available for important gatherings of thousands of people held over several days.

The right to use and to take water is an essential part of the historical and contemporary lives of Indigenous Nations. Today, water continues to be central to the survival of Indigenous people in Australia. As stated earlier in this discussion paper, the River Murray is central to cultural, spiritual, social, and economic sustainability and identities of the Indigenous Nations.

The right of Indigenous peoples to use and take water has been recognised in various native title determinations. The Martu and Ngurrara Peoples' determination, for example, recognized the right to 'take, use and enjoy the flowing and subterranean waters in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs, including the right to hunt on and gather and fish from the flowing and subterranean waters'.<sup>23</sup>

The difficult task of determining how best to manage the scarce water resources of the Murray River cannot side-step the inherent

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<sup>22</sup> Queensland Murray-Darling Committee, Regional Natural Resources Management Plan, Draft Version 2, December 2002, page 102.

<sup>23</sup> *James v Western Australia* [2002] FCA 1208 (27 September 2002)

rights of Indigenous Nations to the use, access, enjoyment and economic utility of the water of the Murray.

### **Use and enjoyment of the natural resources**

The hunting and fishing rights of Indigenous peoples are recognized by the number of provisions in existing legislation in numerous jurisdictions which preserve Indigenous peoples' right to hunt and fish, both within and outside of the native title context. The changed water regime of the Murray River system has affected the fishing economy, as one Indigenous respondent described, 'Fish traps are being destroyed due to constant high levels of water, and [we are] not being able to maintain the fish traps as we used to do.'

Rights to hunt or fish should be understood as merely specific articulations of general rights to use and enjoyment of natural resources from traditional lands Indigenous peoples right to harvest and husband the natural resources of their country should not be seen as a right of opportunity – dependent upon the availability of resources not otherwise in use or depleted – but as a positive responsibility placed upon natural resource management to protect access and incorporate it into the priorities for management.

### **The right to pursue an economic life**

Indigenous Nations have a right to pursue their economic life and develop economically.<sup>24</sup> Native title determinations agreed by consent have related this right to the native title and rights to country.<sup>25</sup>

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<sup>24</sup> See recent treatise on the right to development in ATSIJJC *Native Title Report 2003*, HREOC, chapter 1.

<sup>25</sup> For example, see . *Western Yalanji or "Sunset" peoples v Pedersen* [1998] 1269 FCA (28 September 1998) which recognised the right of the native title holders to 'exercise and carry out economic life on the determination area including the creation, growing, production, husbanding, harvesting and exchange of natural resources and that which is produced by the exercise of the native title rights and interests'.

The Indigenous Nations within the Murray Darling Basin had developed over many thousands of years an extensive trade and exchange system with other Indigenous Nations. Major quarry sites, with evidence of nearby specialist production centres for greenstone axes, and the trade of other commodities over vast tracts of the catchment, presents clear evidence for the storage and distribution of prized goods. It is well accepted that societies of the Murray Darling actively participated in redistribution networks that provided reciprocal rights of access to each others' land and resources, that these commodities were exchanged for other goods of value and prestige and that the resources and minerals of the land were owned by specific individuals and groups.

This trade is combined with the subsistence and communal use of the resources to provide the basis for a regional cultural economy. These customary uses translate into contemporary economic pursuits.<sup>26</sup>

- That the MDBC and the Ministerial Council ensure that cultural, environmental and social values are given equal weight with economic values in policy and management decisions and water pricing in the Basin

*Recommendation of the Indigenous Response Final Report*

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<sup>26</sup> In the application of Article 27 to economic development see *Lansman et al v Finland No. 1* (24 March 1994) CCPR/C/49/D/511/1992

## The right to protect cultural heritage and identity

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A central concern expressed in the *Living Murray* consultations was that many decision makers are not considering the cultural knowledge of the Indigenous Nations of the Murray. The right to control access to and use of knowledge, including language, practices and innovations is an important right of the Indigenous Nations. The right to protect cultural knowledge extends beyond knowledge about specific places, and protecting those places. The Indigenous Nations are entitled to seek to maintain the ownership of intellectual and cultural property, even in words, or in their use of or relationship with particular species, and in any commercial advantage that may be derived from their use.

The draft principles and guidelines for the protection of the heritage of Indigenous peoples by Chairperson-Rapporteur Madame Erica-Irene Daes on behalf of the United Nation Working Group on Indigenous Populations state, *inter alia*, that:

- *To be effective, the protection of Indigenous peoples' heritage should be based broadly on the principle of self determination, which includes the right of Indigenous peoples to maintain and develop their own cultures and knowledge systems, and forms of social organisation.*
- *Indigenous peoples should be the source, guardians and the interpreters of their heritage, whether created in the past, or developed by them in the future.*
- *The discovery, use and teaching of Indigenous peoples' heritage are inextricably connected with the traditional land and territories of each people. Control over traditional territories and resources are essential to the continued transmission of Indigenous peoples' heritage to future generations, and its full protection.*

Australia has a responsibility to recognise and protect the distinct enjoyment of rights by Indigenous people in order to protect activities central to cultural survival. This obligation to Indigenous peoples arises from the Crown's power to regulate and

extinguish rights. Australia cannot choose the degree to which rights will be recognised. Positive measures to provide minimum standards for the protection of the distinct rights of Indigenous peoples are required by international law.<sup>27</sup>

### **Relationships with particular species of flora and fauna**

With the degradation of the Murray River, many native plants and animals are disappearing. The Indigenous Nations will emphasise the cultural and spiritual importance of particular species, many of which are at risk or have abandoned their traditional country. This may take the form of hunting for particular rituals or ceremonies, but may extend to the assertion of an exclusive right to harvest, or priority, or a right to protect the species. The relationship with such species requires protection and revitalisation.

### **Sites of significance**

Throughout the consultations, the Indigenous Nations asserted their right to access and control access by others to sites and places of significance. They also emphasised a right to protect unauthorised or inappropriate use of such sites and places, and a right to control and manage the transfer of cultural knowledge about these places. This may involve the management of flows and effects of flooding.

Such rights should not be understood simply within the sphere of spiritual importance but extend to other cultural and heritage concerns of access and may, for example, embrace the commercial advantage received from protecting prime harvesting areas, for example, just as commercial advantage should be recognised as a legitimate objective in maintaining and protecting knowledge about those places.

Consultation and protection measures are imperative in assessing the impact of changing flows on the important cultural sites of each Nation in any plan to return water to the Murray.

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<sup>27</sup> International Covenant on Civil and Political rights, Art. 27.

## **The right to a cultural flow**

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### **Preserving the cultural economy**

In order to enjoy rights such as fishing rights, or more general cultural and economic rights central to the maintenance of Indigenous Nations cultural traditions, it is first critical to have a healthy river system. The degradation of the river system has threatened these pendant rights.

The Indigenous Nations of the Murray have identified the interrelationship between these elements as the need to preserve the cultural economy through the identification of cultural flows. That is, sufficient environmental, social and economic water flows and volumes must be allocated to the River and to Indigenous Nations to sustain the cultural economy of each Nation in the River system

## The right to equal enjoyment of human rights

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Local Indigenous communities have grown around missions reserves and regional and rural labour markets. Unlike the broad rural demographic trends of rural-to-urban decline and an ageing population, the Indigenous Nations are staying on their land, and the Indigenous Nations and Indigenous communities have growing, young populations.

In addition to the issues that the Indigenous Nations share with the broader rural community, the history of colonisation and the effects of institutionalised and overt racism have resulted in Indigenous peoples in Australia remaining the most disadvantaged groups in Australia.<sup>28</sup> The river is critical to their health and welfare; a lack of supply of clean water is linked to high morbidity and mortality rates. Overcoming historical disadvantage in the provision of services and infrastructure and the future development of growing local Indigenous communities and Nations should be incorporated into planning objectives.

Indigenous peoples should not have to call for a right to the equal enjoyment of fundamental rights such as clean drinking water, or adequate and safe domestic water supplies. However, this human rights and citizenship issue, is one that was highlighted in the final report. Clearly, communities along the river feel they do not enjoy access to infrastructure that can deliver a basic level and standard of healthy water supply.

Communities need a clean and reliable water supply. Water should be clear and drinkable. A priority of the *Living Murray Initiative* should be to ensure sufficient quantities and quality of water for human consumption. The healthy river outcomes sought by the Indigenous Nations to sustain their communities, will sustain other communities along the river.

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<sup>28</sup> See, Steering Committee for the Review of Government Service Provision, *Overcoming Disadvantage: Key Indicators – Report*, 2003.

## Recognition in domestic legislation and policy

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The exercise of rights and responsibilities under Indigenous law is rarely supported by express recognition within the non-indigenous legal system. However, state land rights regimes, customary fishing and hunting reservation and, of course the *Native Title Act* have either explicitly or implicitly acknowledged the fact of Indigenous occupation of traditional country and the continuing cultural authority of those communities.

### Native title

In *Mabo v Queensland [No. 2]* the High Court determined that Indigenous peoples should be treated equally before the law with regard to their rights over their traditional country.<sup>29</sup> The Court rejected any position in law that would discriminate against Indigenous peoples by denying the existence of rights that had been enjoyed freely prior to colonisation and continued to be exercised.

Native title was described as *sui generis*, or unique, because it reflects the rights and entitlements of Indigenous peoples under their own laws. The rights and laws that are recognised through native title do not depend on government for their existence, but they did require recognition through the common law in order to be enforceable in the Australian legal system.

The *Native Title Act* refers to the ‘land and waters’ as a single proposition. Determinations of native title have similarly undifferentiated land and waters in the determination area. In areas where exclusive native title is recognised, native title holders have extensive rights over the land including full rights of ownership, management and economic exploitation.

Even where native title is not exclusive, due to the impact of extinguishment and coexisting tenures, a number of native title determinations have recognised exclusive and non-exclusive rights over waters within the determination area as well as

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<sup>29</sup> *Mabo v Queensland [No.2]* (1992) 175 CLR 1 (*Mabo*)

specific rights, enumerated in the determination. For example, native title has been recognised to include, among other things:

- The right to use and enjoy the land and waters of the determination area
- The right to take water,
- The right to fish,
- The right to control use by others, and,
- The right to protect places of significance, including sites under water.

In 1998 the Commonwealth government moved to restrict the procedural rights available to native title holders under the Act to in relation to developments concerning rivers and waterways. Section 24HA provides that a future act in relation to the management or regulation of water is a valid act, including legislation, regulations plans of management or licences granted.

Native title claimants and holders are entitled to be notified and given an opportunity to comment. Where native title interests are affected the native title holders may receive compensation. It has been noted that the sanctions for failure to consult are insufficient.<sup>30</sup>

### **Other legislative protections**

Responsibility for the management of inland waters and waterways rests primarily with the States. While the Commonwealth Parliament does not have an express power to make laws for the management of inland waters, increasingly State and Territory laws and policies in relation to waters are being guided by international law and national policies. COAG is the principal forum in which these national policies are developed and implemented.<sup>31</sup>

Only New South Wales and, to a lesser extent, Queensland legislation contain provisions dealing with distinct Indigenous

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<sup>30</sup> *Harris v Great Barrier Reef Marine Park* [2000] FCA 603 (11 May 2000).

<sup>31</sup> Indigenous Rights to Water Report: Lingiari Report to ATSIC, draft.

interest in waters (*Water Management Act 2000* (NSW); *Water Act 2000* (Qld)). This lack of legislative recognition is reflected in the water allocation plans currently being developed or implemented in most Australian jurisdictions.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) provides some protection for Indigenous rights in water. The Act has as its definition of ‘significant Aboriginal area’: an area of land in Australia or in or beneath Australian waters; an area of water in Australia; or, an area of Australian waters. Heritage protection for Indigenous places of national significance is provided under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).<sup>32</sup> State heritage legislation also provides protection. These statutory authorities enforce management responses to cultural heritage concerns in the Murray Darling Basin, such as at Lake Victoria.

Indigenous rights to fish in the Murray Darling Basin are recognised by the Commonwealth *Native Title Act*, and by New South Wales and Queensland state legislation. In NSW Indigenous people are exempted from holding recreational fishing licences (*Fisheries Management Act 1994* (NSW) s.34C); in Queensland Indigenous people may take fish under Indigenous tradition (*Fisheries Act 1994*, s.14). Indigenous people also have hunting and gathering rights under most national parks legislation.

### **The limits of existing regimes**

The Court in *Mabo* recognised that Indigenous peoples’ rights to land exist outside common law or legislative recognition, but the judges specifically asserted that the State has power to extinguish native title unilaterally, without consent or recompense.<sup>33</sup> Recent cases have restricted the number of Indigenous peoples who will have access to native title as a means to protect their inherent rights or to enforce their traditional laws. The wholly or partially

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<sup>32</sup> This Act purports to implement Australia’s obligations under the Convention on Biodiversity, articles 8(j) and 10(c).

<sup>33</sup> *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at pp. 68-74, per Brennan J; pp. 94, 100, per Deane and Gaudron JJ (although compare p. 92); and pp. 194-5, per Toohey J.

extinguishing effects of historical tenures will be particularly devastating for Indigenous peoples of the South East of Australia.

The extent of extinguishment and the limits that have been built into the legal doctrine of native title suggest that native title should not be the only benchmark for the engagement of Indigenous Nations. Just as the recognition of native title in 1992 revealed the inadequacies of existing regimes such as heritage protection, so too, emerging models of engagement outside the native title process highlights the limits of the native title regime in being able to adequately address the rights of Indigenous peoples over their traditional territories.

The existence or otherwise of native title does not determine the legitimacy of Indigenous peoples claims to be involved in decision-making and the protection of their cultural heritage and their land and waters.

Government obligations go further than the preservation of native title rights and compensation for potential impacts on native title rights and interests.<sup>34</sup>

- That the MDBC and the Ministerial Council develop legally binding agreements/protocols with Indigenous Nations, according to their traditional boundaries. The agreements/protocols should establish a framework for involvement by the Nations in management of the Basin's natural resources
  - That the MDBC and the Ministerial Council ensure Indigenous Nations are represented on all natural resource management bodies in the Basin and centrally involved in their policy and management decisions
- Recommendations of the Indigenous Response Final Report*

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<sup>34</sup> *The case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter-American Court of Human Rights, August 31 2001.

## Non-discrimination principle

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The *Racial Discrimination Act 1975* (Cth) (RDA) has proved important in providing protection for Indigenous peoples' individual as well as collective rights. The High Court in *Mabo* determined that although in the past domestic law allowed governments to deal with Indigenous peoples in a discriminatory manner, the RDA, from the time it was passed into legislation, created an obligation on governments to deal with Indigenous interests in a non-discriminatory manner. Governments must therefore exercise their power to deal with property in a manner consistent with the RDA.

The RDA reflects international law principles of equality and non-discrimination that require a more contextualised understanding of equality and what is necessary to secure the enjoyment of human rights for Indigenous peoples. In its General Recommendation XIV (1993) the CERD Committee explained that a distinction for the purposes of Article 1 of CERD 'is contrary to the Convention if it has either the purpose or effect of impairing particular rights or freedoms' or has an 'unjustifiable disparate impact upon a group distinguished by race, colour, descent or national or ethnic origin'.

This relies on three distinct measures of equality. The first is formal equality which requires that human rights be enjoyed without arbitrary or unjustified distinction. The second embodies the positive duty to eliminate systematic, institutionalised or historical disadvantage.<sup>35</sup> The third is the concept of substantive equality, which recognises that differential treatment is not necessarily discriminatory if it is legitimate, that is recognising legitimate difference or distinct rights.

At a minimum, the same protection, such as Constitutional guarantees of just terms for compulsory acquisition of property,

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<sup>35</sup> Overcoming systemic disadvantage is a positive duty. Article 1(4) specifically refers to 'special measures' or affirmative action aimed at advancing disadvantaged groups or redressing past injustice or systematic or institutionalised discrimination for the purposes of ensuring the equal enjoyment of human rights.

which apply to non-Indigenous interests must also apply to Indigenous peoples' interests. More appropriately, it would require specific measures that recognise the distinct cultural importance of particular traditional lands to the Indigenous owners.

Apart from invalidating acts that discriminate, the RDA also has an effect where the operation of the legislation is racially discriminatory in its treatment of Indigenous peoples' interest in the recognition of rights, for example in the provision for compensation.

## Reparations and compensation

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Indigenous people are land holders., Despite the history of dispossession, Indigenous Peoples have managed to maintain or regain control over portions of land and waters within their traditional territory and maintain an interest in the management of the remainder. The colonisation of Indigenous peoples' country in the 1800s resulted in the occupation of much of their traditional lands and waters. The redistribution of this land to other interests has meant that Indigenous peoples became the most disadvantaged in relation to land holding. This severely restricted the ability of Indigenous Nations to establish an economic base from the land.

In native title, legislative amendments have assumed that any diminution of Indigenous peoples ability to exercise their traditional rights over land, through extinguishment of native title, could be dealt with by providing for compensation. To this end, the principles of non-discrimination were suspended to ensure that the state and Commonwealth governments could 'validate' past titles and interests and confirm the right of government to ignore Indigenous interests in other circumstances. This was deemed acceptable so long as provisions were made for compensation.

Compensation is a remedy of last resort in relation to Indigenous peoples' traditional lands and waters. Only where it is impossible to protect or return lands should compensation be considered, and then, it should be considered in the form of land and waters before monetary compensation.<sup>36</sup>

In *Ward v Western Australia*,<sup>37</sup> the High Court of Australia compared Indigenous interests as native title holders with other existing legal interests. They found a number of circumstances in which Indigenous interests had not being treated equally. For example, almost all national parks in the Northern Territory have come under question as a result of the Territory government's

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<sup>36</sup> The NTA accepts this principle at least, providing for non-monetary compensation to be considered. [ref]

<sup>37</sup> *State of Western Australia v Ward* [2002] HCA 28 (8 August 2002).

failure to treat Indigenous people as occupiers with an interest in land.

Where new rights and interests are being created based on utility or actual use, as is being discussed by the current water reforms, then Indigenous interests should be considered in terms of equal treatment, unique rights and reparations for historical wrongs and ongoing disadvantage. If governments fail to take into consideration Indigenous rights to water, then they fail to provide a robust basis for the development of the water reforms, exposing governments to later reparations.<sup>38</sup>

Cultural use and lost utility should be taken into consideration in determining compensatory regimes under the *Living Murray* project. The allocation of water for cultural flows can be seen as reparation for past dispossession of water and impacts on cultural rights.

### **Sustainability and the precautionary principle**

The precautionary principle is a key principle of ecologically sustainable development, applied when there is scientific uncertainty and the possibility of serious damage to environment. The idea behind the principle is that appropriate action needs to be taken to avoid the risk of any serious and irreversible damage to the environment. The precautionary principle is applicable in all spheres of human activity and should be applied to decisions which affect the capacity of Indigenous Nations to continue living on their lands and waters.

The precautionary principle should be applied when making decisions on the impact of returning water to the environment. The implications of failing to return health to the river system has a disproportionate impact on Indigenous peoples' relationship with the Murray as it is linked to their cultural and spiritual identity and their status as first and last peoples of the Murray River.

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<sup>38</sup> See further Altman, Jon, and Michelle Cochrane, Indigenous Interests in Water: A comment on the 'Water Property Rights – report to COAG from the water CEOs group' discussion paper.

## Outcomes and mechanisms

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### Indigenous priority in water allocation

State legislative regimes often reserve rights of Indigenous peoples to continue customs and practices of fishing hunting and foraging. Section 211 of the *Native Title Act* exempts native title holders from licensing or other regimes for fishing and hunting. The provisions create a statutory priority for native title rights over regulatory legislation.<sup>39</sup> Under s.211, the exercise of rights pursuant to native title is only trumped by research, environmental and public health and safety legislation. This raises an important principle in determining the impact of outcomes adopted by the *Living Murray* project and the objective of measures to meet these purposes.

In Canadian Courts similar issues of priorities have arisen. In that jurisdiction it is recognised that Indigenous non-commercial rights are prioritised above all non-Indigenous interests but are subject to legitimate environmental and conservation measures. It has been held that conservation measures could be justified to take priority over Aboriginal rights because they are inherently consistent with the protection of the environment for future generations and the maintenance of the underlying connection that sustains the distinct cultural identity of the group.<sup>40</sup>

Importantly, the Canadian Courts placed an emphasis on Indigenous peoples' direct involvement in conservation management. The Courts have held that a legitimate legislative objective of conservation overriding Indigenous interests is only met where Indigenous people had been consulted (and not just informed) and, moreover, were unable or unwilling to implement appropriate measures themselves. In addition, the test assumes that conservation objectives could only be achieved by restricting the rights of Indigenous peoples and not by restricting other users. The Aboriginal right takes precedence over the rights of others

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<sup>39</sup> and presumably Commonwealth legislation unless later legislation which is clearly inconsistent and overriding the Native Title Act.

<sup>40</sup> *R v Sparrow*, op.cit

and should be occasioned as little interference as possible to achieve the regulatory objectives.<sup>41</sup>

Section 211 and other provisions in state legislation recognise, although perhaps inadequately, the legitimate priority of Indigenous interests over other interests in relation to fishing and hunting for personal or communal use. However, Indigenous peoples will seek the same respect for their pre-existing rights in the future allocation of resources, licences and other interests.

➤ *Water allocation rights*

For the Indigenous peoples of the Murray River, water resources provide an opportunity for developing and participating in rural industries. Water allocation rights can mean inclusion in the water trading environment for economic development opportunities, or for achieving cultural and environmental objectives by allocating water for cultural or environmental flows.

The creation of new water property rights without recognition of Indigenous rights in the water denies the existence of those rights, and denies the future participation of Indigenous people in the water property regime. The potential exists for a positive contribution to Indigenous economic development.

The allocation of water directly to the Indigenous Nations and/or local Indigenous communities is the most appropriate model. A generic water trust or provision for affects on native title rights and interests would be unlikely to achieve the objectives of self-management and economic development.

Further work could be done to determine a baseline requirement for cultural flows of each Nation which could be used to determine future allocations and return of waters to the 'environment' or directly to Indigenous Nations as actual use allocations or compensation, in accordance with the priority set out above.

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<sup>41</sup> This priority is not dependent on Constitutional protection (see *Jack v R.*). Nor is it dependent upon aboriginal title.

The allocation of water directly to Indigenous Nations and/or local communities serves a number of purposes:

- Preservation of current domestic, cultural, and economic use;
- Redressing lost utility and dispossession;
- Purchasing ‘eco-cultural services’;
- Reinforcing self-management;
- Protecting future cultural development;
- Facilitating economic development; and
- providing for community growth.

Keeping in mind the principles of engagement with Indigenous Nations, flows and allocations should be determined on a Nation to Nation basis.

➤ *Co-management*

Australia is internationally recognised for its co-management arrangements with Indigenous people for the National Park Estate and areas of World Heritage.<sup>42</sup> Frameworks are currently being developed for a co-management regime with the Great Barrier Reef Marine Park Authority. Co-management provides a model for partnership between governments and the Indigenous Nations of the Murray. Co-management of water resources in the Murray River could provide a mechanism for negotiating responsibilities to water.

Co-management could be linked in with river protected areas, where parts of the river could be protected for the purpose of restoring the native fish and vegetation, or co-management could cover the environmental and cultural objectives of managing the water resources of the Murray. MDRIN have proposed a co-management model that would see Cultural Heritage Management Protocols negotiated separately with each Indigenous Nation, working under an umbrella agreement for the region. The importance of co-management arrangements for Indigenous peoples are recognised by the Royal Commission on Aboriginal

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<sup>42</sup> [ref]

Deaths in Custody, which recommended greater Indigenous control over Indigenous cultural heritage through the joint management of national parks.<sup>43</sup>

- That the MDBC and the Ministerial Council develop Cultural Heritage Management Plans (CHMPs) with Indigenous Nations, according to their traditional boundaries
- The CHMPs should be incorporated into all relevant natural resource plans and local council development plans

*Recommendation of the Indigenous Response Final Report*

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<sup>43</sup> Recommendation 315.

## Policy context

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The engagement between Indigenous Peoples and the Murray Darling Basin Commission in relation to the *Living Murray Initiative* should be considered in the light of broader policy reforms within the Commission. There are some positive developments within the CAC, the MDBC and the Ministerial Council which is set to provide the processes and frameworks to give recognition of the unique and diverse governance of the Indigenous Nations. These processes will allow for the development of special measures; to set out procedures for negotiated agreements, to be represented, to facilitate adequate representation and to gain the informed consent of the Indigenous Nations to be centrally involved in policy and management decisions on natural resources within the Basin.

### Memorandum of Understanding

#### *Development of General Frameworks and Processes*

As a response to the Memorandum of Understanding between the Murray Darling Basin Commission and the Murray Darling Rivers Indigenous Nations general frameworks and processes will be developed to enable each of the Indigenous Nations within the MDRIN to reach understandings and agreements with MDBC and its *Initiative Partners*.

These Agreements may include, but are not limited to:

- Agreement as to representation, participation and engagement in the process of natural resource management
- Cultural heritage protocols
- Native title agreements and procedures; and
- Social and economic outcomes

#### *Scope of MDRIN coordinated activities*

In forming a confederacy of Nations for the purpose of engaging with the MDBC, the Nations of the Murray have recognised that,

while respecting the diversity among themselves, certain issues can be and are best dealt with through a coordinated approach. Recognising that specific projects, resourcing and priorities would be need to be identified and negotiated directly with the each Nation, activities that would benefit from coordination through MIDRIN include, but are not limited to:

- *Nation Profiles* – collating essential information that establishes the demographic profile and identifies the environmental, economic and cultural issues of importance to each Nation.
- *Traditional Nation boundaries* – respond to the need expressed by Nations for better definition of the traditional boundaries of the Basin’s Nations in order to reduce disputation and clarify responsibilities.
- *Skills and governance audit* – identifying appropriate processes and support required on a Nation-by-Nation basis to enhance internal governance structures;
- *Development of Cultural Maps and Plans of Management on Indigenous Cultural and Environmental Heritage for each Nation* – developing a plan of action that will promote the sustainable use of natural resources in the homelands of each Nation, recognising that economic and social outcomes are integral to achieving environment and cultural heritage management outcomes.
- *Vision and goals* –to develop a vision statement and define processes for MDRIN that are informed by developing capacity, governance and leadership within each Nation.

The development of Nation profiles and development of governance structures based on each Nation’s traditional cultural and environmental heritage assets can provide a firm basis for negotiating better outcomes and place Indigenous Nations in a position to clearly inject their views, values and priorities into government policies and plans for natural resources management and regional development.

### **Integrated Catchment Management**

MDBC Integrated Catchment Management Business has also approved the development of:

- An Indigenous Action Plan, and
- Indigenous Leadership, Governance and Capacity Building

*The COAG Reconciliation Commitment and the Indigenous Action Plan to Advance Indigenous Engagement 2003-05*

The Murray-Darling Basin Ministerial Council in 2002 resolved to develop an Indigenous Action Plan in response to its adoption of the COAG Reconciliation Commitment. In the same year the MDBC commissioned the Bellamy Report which provided an integrated overview of State reviews of Integrated Catchment Management from across Australia and an analysis of potential lessons for the implementation of Integrated Catchment Management in the Murray Darling Basin.

The planned outcomes from this project are:

- A detailed report on the progress of Indigenous engagement for consideration by the MDB Ministerial Council to satisfy the reporting requirements detailed in the COAG Reconciliation Commitment;
- The development of policy and benchmarks as practical means to measure progress and enable the Ministerial Council to review the advancement of Indigenous engagement. This includes performance reporting strategies, accountability, monitoring and key indicators;
- A synergy between Indigenous Action Plans across the Ministerial Councils, with responsibility for Indigenous natural and cultural resource management, to coordinate how the priority areas outlined in the COAG Reconciliation Framework are addressed;
- The collection of data to develop Indigenous profiles to gain understanding of the dynamics of Indigenous peoples within the Basin to inform Commission processes.
- The generation of knowledge to inform and add-value to existing programs and activities;

- The provision of information for the MDBC and government agencies to evaluate Indigenous service requirements and to underpin the re-engineering or re-structuring of existing programs and activities;

*Leadership, Governance and Capacity Building Project 2003-05*

To ensure that engagement between MDBC and the Indigenous Nations is meaningful and meets the aspirations and goals of each of the parties, the MDBC has committed resources to support the development of leadership and governance within Indigenous Nations. The desired outcomes of this project are to empower Indigenous peoples to actively participate in natural resource management through the development of culturally appropriate concepts of governance, capacity building and leadership within the Indigenous Nations of the Murray-Darling Basin. The project aims to:

- Enhance the capacity for Indigenous peoples to meet the challenge of defining and developing Indigenous governance and leadership processes endemic to their traditional country within the Basin
- Invest in Indigenous peoples to be self-determining and empowering them to inform policy, develop and implement tradition-based strategies and knowledge into the conservation of biodiversity, cultural heritage and natural resource management and into the framework of ICM.
- Provide culturally based learning modules for Indigenous peoples to assist them to develop and implement cultural and environmental management plans, which would provide a vehicle in developing capacity, governance and leadership that is based on traditional knowledge and informed technical and scientific knowledge.
- Assist in the development of a skills audit of people held within each Indigenous Nation

- Invest in infrastructure that supports Indigenous peoples beyond this project
- Establish cross-linkage between the Indigenous Action Plan, MDRIN MoU, The *Living Murray Initiative* and all MDBC Integrated Catchment Management projects.

These initiatives respond to the procedural rights of Indigenous peoples to be meaningfully involved in decisions affecting their country. They should be underpinned by principles of self-determination of individual Nations and a recognition that this process involves something more than mere consultation.

## **Further Action**

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This discussion paper was developed to provide input to the immediate processes of the *Living Murray Initiative*, and to support the recommendations of the Indigenous Response, by placing their recommendations in a policy framework. Many of the recommendations from the Indigenous Response to the Living Murray Initiative 2000 are addressed within the body of this discussion paper. Two key recommendations should be highlighted as they are central to the next stage of the Living Murray process as the community consultations are considered and the decisions of the MDBC Ministerial Council are implemented.

### **Recognising the distinct rights and interests of Indigenous Nations in the Murray Darling Basin and the reforms**

The Indigenous Nations have called for the issues, concerns, values and aspirations of Indigenous peoples be placed on the MDBC Issues Log of the broader community engagement process and be considered by the MDBC and the Ministerial Council.

- Recognising the need for justice
- Establishing a package of rights
- Development of reparation and compensation
- Embracing Indigenous Nations self determination
- Development of an economic base for Indigenous Peoples
- Ensuring cultural and environmental heritage protection measures

### **Establishing principles and processes for engagement with Indigenous Nations**

The Indigenous Nations also sought commitment from the MDBC that they will proceed with the three-stage Indigenous Engagement Project detailed in the Feasibility Study and provide necessary resources to enable;

- further consultation and negotiations around the current reference points for environmental flows so healthier outcomes for the river are possible
- establishment of a culturally appropriate process for assessing the social, cultural, economic and environmental impacts of any decision on the Indigenous Nations and Indigenous Peoples generally;
- allow for further clarification of the rights of the Indigenous Nations Rights to Water; and
- that the Ministerial Council and the MDBC receive a delegation from the Indigenous Nations to allow clarification and discussion to the Ministerial Council meeting of October 2003.

While the October 2003 deadline has passed, and initial decisions have been taken in relation to the *Living Murray Initiative*, there is an ongoing need to address these recommendations and to urgently incorporate Indigenous Nations and Indigenous community concerns within the current reform process that will establish the principles and details of engagement between MDBC and Indigenous peoples. The Indigenous Engagement Project is an investment in the future management of the Murray Darling Basin. Time and effort invested in appropriate processes at this time will result in tangible benefits for future decision making. These processes of engagement must, however, remain linked to the recognition of distinct rights and delivery of measurable outcomes for Indigenous Nations.

## Further Reading

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# Appendix

## **Report to the Murray Darling Basin Commission**

### **Indigenous Response to the Living Murray Initiative**

**April 2003**

## **Introductory Note**

Please note: This is a report commissioned by the MDBC to detail Indigenous responses to The Living Murray.

The contents of this publication do not purport to represent the position of the Murray-Darling Basin Commission.

The intention of this paper is to inform discussion for the improvement of the management of the Basin's natural resources.

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## Part 1      Executive Summary

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### 1.1      Background

The Murray Darling Basin Ministerial Council agreed to the following vision for the River Murray in March 2001 – “*a healthy River Murray system, sustaining communities and preserving unique values*”.

In April 2002, the Ministerial Council:

1. agreed to hold a community-wide consultation process about environmental flows, beginning in April 2002;
2. directed that a comprehensive study be done on the costs and benefits to the environment and the community of returning water to the environment;
3. recognised a need to spend \$150 million on modifying dams, weirs and locks and other measures to make best use of all the water currently available to the environment; and
4. recognised the importance of establishing water trading arrangements for the efficient allocation of the scarce water resources of the Basin and that the effectiveness of these arrangements will depend on clear definition of access rights to water.

The Murray Darling Basin Commission (MDBC) is to report to the Ministerial Council on community engagement. It wants to determine the community’s knowledge, values, aspirations, issues information needs and concerns in relation to the vision of the Ministerial Council.

The MDBC has commissioned this report to detail Indigenous responses to these matters.

In compiling this report, the Farley Consulting Group (FCG) has worked in conjunction with MLDRIN.

This report is required to:

1. identify the range of issues, concerns, values and aspirations raised throughout the consultations, including knowledge gained from consultations undertaken by MLDRIN;
2. outline the geographical scope, representation and interests covered in the consultations;
3. provide direction for the broader community engagement strategy to address any issues relating to engagement and communication requirements for Indigenous communities.

## **1.2 Introduction**

The Murray Darling Basin Ministerial Council is asking the community to discuss the best way to achieve its vision of “a healthy River Murray system, sustaining communities and preserving unique values”. The Murray Darling Basin Commission (MDBC) is to report on community engagement to the Ministerial Council.

### **1.2.1 Feasibility Study**

An initial Feasibility Study was undertaken by MLDRIN and FCG in October 2002. The Study was accepted by the MDBC in December 2002.

The Feasibility Study identified the need for a two-stream approach:

- one by MLDRIN to engage Traditional Owners/Nations through workshops;
- one by the FCG to engage other Indigenous people and organisations through public forums.

The Feasibility Study also identified the need for a three-stage Indigenous Engagement Project:

- stage 1 to report on issues, concerns, values and aspirations;
- stage 2 to inform the community of Ministerial Council responses to stage one, consider social and economic impact research, and gather subsequent community reactions;
- stage 3 to advise the community of actions that will be taken by government.

## **1.2.2 Community Engagement Process**

Indigenous responses were gathered in two streams:

- workshops with Traditional Owners/Indigenous Nations;
- public forums to enable input from other Indigenous people and organisations.

Responses from the two streams are remarkably consistent.

The central themes are:

- 1. Shared Vision**
- 2. Recognition,**
- 3. Respect for country,**
- 4. Involvement**
- 5. Policy Change**

### **1.2.2.1 Shared Vision**

The vision for the River Murray is one of a healthy, living river system with natural flows and cycles.

It is essential that the visions of Indigenous Nations are accepted in holistic terms. It is also important to note that while the visions of Indigenous Nations could be the same or similar, they will also be independent due to the inherent cultural diversity of each Nation in relation to traditions, sites, stories and cultural practices.

Such diversity is not confined to Indigenous Nations – it is reflected in the different approaches and priorities of States and Territories within the Commonwealth system.

Management of the River Murray needs to incorporate a range of outcomes including those listed below:

- Healthy
- Free flowing
- Alive
- Natural cycles
- Restocked
- Revegetated

- Access rights for Indigenous people so they can move freely to continue cultural practice
- Traditional fishing/hunting
- Indigenous people and Nations recognised and respected for what and who we are
- The rivers and tributaries are respected and cared for
- Indigenous Nation recognised as sovereign entities in their own country.

### **1.2.2.2 Recognition**

Distinct rights exist for Indigenous peoples as part of their rights to self-determination. These rights should be recognised as inherent and holistic. They are:

- Customary rights of Indigenous Nations along the Murray Darling system; and
- Human rights to maintain a cultural economy

Customary rights relate to cultural self-determination and the preservation of distinctive cultural identities.

Human rights to maintain a ‘cultural economy’ relate to Indigenous Nations being able to undertake activities that secure sustainable capital from the natural resources that traditionally and historically belong to each Nation.

### **1.2.2.3 Respect for Country**

Indigenous peoples clearly identified concerns about the lack of respect not only for themselves, but also for the natural resources of the country.

The river system must be treated with respect, as it is the lifeblood of the country. If the river is in poor health, it can not provide spiritual, cultural, economic and social benefits to all those who depend on it.

The basis of management of the river system must be a whole landscape approach, including all tributaries of the River Murray. The objective for management of the river’s resources must be **sustainable use** with the core values of the river system preserved as a legacy for future generations.

To fully respect the river and all adjoining systems, the mouth of the River Murray should be open. This can only occur if the needs of the river are respected - it effectively means increasing natural flows, bringing back native fauna and flora and eradicating introduced species such as carp and willow trees.

#### **1.2.2.4 Indigenous Involvement**

The community engagement process highlighted quite clearly that Indigenous people want to be actively involved at all levels of management of natural resources throughout their traditional lands.

The initial building block for involvement by Traditional Owners should be protocols with Indigenous Nations about how they wish to do business with government and the general community on management of natural resources.

The draft Memorandum of Understanding between the MDBC and the Murray and Lower Darling Rivers Indigenous Nations (MLDRIN) is a starting point and should be endorsed by the MDBC, the States on the Ministerial Council and the ACT.

Cultural Heritage Management Plans (CHMPs) then should be developed between government and Indigenous Nations with custodial responsibilities for the river system. The CHMPs should have the force of law and reflect the inter-relationship between environmental values and spiritual and cultural values.

#### **1.2.2.5 Policy Approaches**

The consultations raised a number of issues about the policy approaches used by government for management of the river system and the role of Indigenous people in the policy development process.

There was a clear view that cultural, environmental and social values should be given equal status with economic values when policy and management decisions are made. This would require the development of new indicators and changes to the structure of water pricing in the Basin.

It also was very clear that Indigenous Nations believe they have rights to be engaged and involved, and wish to be engaged and involved, at all levels in the management of the river system.

### **Water allocations to provide for cultural economy**

There was a widely held view that a water allocation should be available to each Indigenous Nation to enable them to exercise their custodial responsibilities to care for the river system. Each Nation would decide whether its allocation should be used to increase environmental flows or to help generate a more independent economic base for their people. The decision would be taken in the context of the health of the river system and their custodial responsibilities.

At the same time, there should be initiatives to encourage more efficient use of water. This would entail public investment in incentives and assistance for industry and other water users to change management systems.

### **Compensation**

Indigenous people reject the concept of compensation for any loss of water allocations by industry as inequitable, given the legislative history of Australia that prevents Indigenous Nations from having any rights to water.

The spiritual, cultural, economic and social health of Indigenous peoples depends on the health of the river system. If the system is unable to provide such support, many Indigenous people believe there is a basis for compensation for loss of traditional values.

### **Environmental flows**

Indigenous people believe the policy objective must be to restore natural flows and cycles to the river system. The current reference points determined by the Ministerial Council for increased environmental flows are unsatisfactory. Even the top reference point has only a low to moderate probability of restoring the health of the river system.

Indigenous people also believe management of the river system's resources should be made more efficient. This may entail additional public investment in infrastructure.

Indigenous people are frustrated that the Ministerial Council has been unable to achieve a whole of government approach to management of the Basin's natural resources.

### **Indigenous Intellectual Rights**

Indigenous people want traditional knowledge recognised for the contribution it can make to resource management and as an Intellectual Property Right.

They believe there should be comprehensive public education campaigns so the community has a better understanding of what is required for sustainable resource use and of the central importance of country to Indigenous culture and spirituality.

### **1.3 Recommendations**

1. That the issues, concerns, values and aspirations of Indigenous people:
  - be placed on the Issues Log of the broad community engagement process;
  - be considered by the MDBC and the Ministerial Council.
2. That the Ministerial Council and the MDBC receive a delegation from Indigenous Nations to allow discussion of the issues.
3. That the MDBC proceed with the three-stage Indigenous Engagement Project detailed in the Feasibility Study and provide necessary resources.
4. That the MDBC provide a forum for Indigenous Nations to come together to determine their position on natural resource management issues and continue to provide support for MLDRIN in this respect.
5. That the MDBC and the Ministerial Council develop legally binding agreements/protocols with Indigenous Nations, according to their traditional boundaries. The agreements/protocols should establish a framework for

involvement by the Nations in management of the Basin's natural resources.

6. That the MDBC and the Ministerial Council ensure Indigenous Nations are represented on all natural resource management bodies in the Basin and centrally involved in their policy and management decisions.
7. That the MDBC and the Ministerial Council ensure that cultural, environmental and social values are given equal weight with economic values in policy and management decisions and water pricing in the Basin.
8. That the MDBC and the Ministerial Council develop Cultural Heritage Management Plans (CHMPs) with Indigenous Nations, according to their traditional boundaries.
9. The CHMPs should be incorporated into all relevant natural resource plans and local council development plans.
10. The CHMPs must be implemented by the respective Indigenous Nations, according to their boundaries, and provide employment for Indigenous people. They also should provide access for Traditional Owners to sites and areas of significance and for hunting and fishing.
11. That the MDBC and the Ministerial Council provide a water allocation for each Indigenous Nation.
12. That the MDBC and the Ministerial Council extend the current reference points for environmental flows so healthier outcomes for the river are possible.
13. Resources are essential to enable equitable engagement by Traditional Owners in natural resource management. Resources will be necessary for negotiation, training, capacity building, and support for Traditional Owner representatives.
14. Cross-cultural training should be undertaken at all levels of government and by natural resource management bodies.

## Part 2 Community Engagement Process

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### 2.1 Introduction

#### *Project Management*

A project Steering Committee was established to oversee the project. It comprises two MLDRIN representatives, one representative of the Community Advisory Committee to the Ministerial Council, and one representative from the office of the MDBC.

The Steering Committee identified where workshops and public forums should be held.

#### *MLDRIN Traditional Owner Group Coordinators*

MLDRIN appointed three coordinators to work with the MDBC and FCG. Each coordinator was given responsibility for consultation with particular Nations.

MLDRIN coordinators held workshops with the following Traditional Owners:

- 12 December 2002 in Murray Bridge – Ngarrindjeri, Kaurna and Peramangk Nations;
- 18 December in Swan Hill – Wamba Wamba and Wadi Wadi Nations;
- 20 December in Albury – Wiradjuri Nation;
- 24 January in Barmah – Yorta Yorta Nation;
- 28 January in Deniliquin – Wamba Wamba Nation;
- 1 February in Balranald – Muthi Muthi Nation;
- 5 February in Robinvale – Mungatanga Elders
- 9 February in Menindee – Barkindji and Nyiamppa Nations.

#### *Public Forums*

Public forums were held by FCG on:

- 5 February in Murray Bridge;
- 7 February in Buronga
- 9 February in Menindee
- 12 February in Swan Hill

- 14 February in Albury.

### *Community & Public Awareness Strategy*

The public forums were advertised in:

- Koori Mail;
- National Indigenous Times;
- Murray Valley Standard;
- Sunraysia Daily;
- Barrier Daily Truth;
- Swan Hill Guardian;
- Albury Border Mail.

In addition, invitations to the public forums were faxed/mailed to 60 Indigenous organisations, based on lists provided by the MLDRIN coordinators.

The MDBC made a presentation on The Living Murray initiative to each workshop and public forum.

### *MLDRIN Community Fact Sheet*

A MLDRIN fact sheet and brief was tabled at each workshop and public forum and a MLDRIN representative presented their views.

The following standard questions were put to each workshop and public forum:

*What is your vision for the River Murray?*

*What is the significance of the River Murray to you?*

*What are the values that should be preserved?*

*What is a healthy river?*

*How should the river's resources be used? What interests should be recognised?*

*What's wrong with the River Murray now?*

*What are the specific areas of cultural significance along the River Murray?*

*How should Indigenous interests in the River Murray be recognised?*

### *Project Feedback Process*

Responses have been consolidated for the purpose of this report, but individual reports from workshops and public forums are attached.

A draft report was considered by the Steering Committee and the MLDRIN Working Group in Berri on 5 March. The draft was authorised with some amendments.

## **2.2 Outcomes of Community Engagement Process**

### **2.2.1 Introduction**

This section of the report provides an overview of the Traditional Owner/Nations consultations and the broader community responses. For responses from individual meetings, refer to the attachments.

In summary the key issues that arose are succinctly identified in the MLDRIN position paper on The Living Murray document:

- **Recognising the need for justice**
- **Establishing a package of rights**
- **Development of reparation and compensation**
- **Embracing Indigenous self determination**
- **Development of an economic base for Indigenous Peoples**
- **Ensuring cultural and environmental heritage protection measures**

### **2.2.2 Summary of Community Responses**

The following information is a summary of the responses from the Traditional Owner/Indigenous Nations workshops and public community forums.

#### **2.2.2.1 Significance of the River Murray**

The River Murray is vital to Indigenous communities in many ways - spiritually, culturally, ecologically, economically, physically and socially.

The River Murray is central to the survival of Indigenous communities in terms of both environmental health and community health. The purity and quality of the water are critical for the safety of communities and children.

### *Cultural Economy*

The River Murray needs to be seen as a “cultural economy” to the Indigenous Nations that belong to the River. The “cultural economy” includes all the natural resources in the River Murray definition.

This ‘cultural economy’ previously allowed Indigenous Nations to maintain their traditional lifestyle across their country. This economy now has been diminished by the poor health of the river system that has decimated traditional sources of food and medicines.

As one group explained – “The healing that we use Old Man Weed for needs to be done by the River. It is the same with fish – we need to catch, cook and eat by the River. Now, we can’t get clay out of the bank to coat the fish or to use on our skin – this is a big part of women’s business.”

### *Cultural Heritage*

The cultural heritage of the River was a significant issue for all Indigenous people. Limited access to traditional lands and lack of acknowledgement of inherent/ birth rights were regarded as impediments to the protection of cultural heritage.

Common responses were:

- “Traditional vegetation along the river banks is disappearing, and it is harder to find with the changing of the habitats”
- “The green tree frog and the black frogs are no longer to be seen.”
- “Birds such as the ducks and swans have nowhere to nest as all the swamp country and flood ways no longer get flooded out.”
- “Fish traps are being destroyed due to constant high levels of water, and not being able to maintain the fish traps as we used to do.”

- “River banks are being eroded away due to constant high levels of water, some areas of the river flood plain are constantly under flood.”

#### **2.2.2.2 What are the values of the River Murray that should be preserved?**

It is important to protect and preserve the nurseries/wetlands/waterways from degradation.

Indigenous people must be given more involvement to protect and care for the river and take on more responsibility to ensure that the river is properly managed

The customary rights of Indigenous people should be recognised, protected, preserved and respected. These customary rights include:

- Spiritual connection
- Management of significant sites
- Protection of Indigenous history/sovereignty/people’s knowledge
- Preservation of Indigenous rights and heritage
- Access for hunting and fishing.

#### **2.2.2.3 What is a healthy river?**

A healthy river is free of toxins and introduced species. It has natural flows and cycles that feed all its parts such as the tributaries, creeks and nurseries. The native wildlife and plant species feed off the river as it provides the necessary nutrients to keep them alive.

The river provides life through food and quality drinking water to Indigenous Nations. It also provides life to the Australian community. It provides natural medicines to heal sickness and enjoyment for recreational purposes.

A healthy river is protected by government from abuse and overuse.

A healthy river is essential to ensure that future generations of Australians can enjoy the same quality of life as past generations.

#### **2.2.2.4 How should the river's resources be used? What interests should be recognised?**

It was acknowledged that all interests and people should be recognised.

A key issue is the lack of recognition of Indigenous interests and need for equal access and rights to water.

The entire ecosystem in and around the river needs to be maintained and looked after. If water is unhealthy, everything else will decline.

Protected areas need to be in place along the rivers to allow fish and other aquatic life to recover from over fishing. The traditional peoples of a given area should be working with government departments to identify such areas and monitor and regulate use of the river's resources.

Native fish should be restocked into the waterways and noxious animals, such as European carp, should be removed.

Speedboats should be confined to certain areas and their speed limited. Speedboats erode the river banks, wash up little fish and shrimp onto the bank and make it impossible for those who want to fish on the bank, or just enjoy the River.

#### **2.2.2.5 What's wrong with the River Murray now?**

The central responses were that the river is "over-used" and "abused" and that government has failed to ensure the river's resources are used in a sustainable way. In so doing, government has failed future generations.

#### **2.2.2.6 What are specific areas of cultural significance along the River Murray?**

There are a number of significant sites along the River that are listed on each State's Heritage List.

These are protected and must continue to be preserved. However, drought levels and over use have reduced water levels and exposed significant sites that are not listed.

There needs to be some form of compensation or avenue that enables recompense where sites have been degraded, or violated by land owners and the river's recreational users.

#### 2.2.2.7 How should Indigenous interests in the River Murray be recognised?

Participants identified a range of strategies that should be applied. They include the following:

- Engaging existing recognised Indigenous groups such as: Traditional Owners, Communities, Heritage groups, Native Title groups, individual landowners and specialist Indigenous organisations and enterprises.
- Enhancing existing legislation (eg Heritage Act).
- Recognising Traditional Owners and their traditional custodial responsibilities for land and waters.
- Recognising Elders as the voice/speakers for their country and their people.
- Providing adequate resources for Traditional Owners so they can participate equitably in policy and management decisions.
- Developing mechanisms for compensation where the traditional “cultural economy” is diminished or destroyed.

#### 2.2.2.8 What is your vision for the River Murray?

The vision for the River Murray needs to be seen in context. There are common themes, but each Indigenous Nation is

independent of all others and has its own custodial responsibilities, which may be exercised in different ways.

The Indigenous vision for the river system is holistic – it incorporates spiritual, cultural, economic and social values. All are inter-related. All the issues need to be addressed together.

The fact that there may be different views from Indigenous Nations should not be surprising. The same position exists in non-Indigenous society. Different States and Territories and the Commonwealth have their own legislative frameworks and approaches to issues.

## **Part 3      Way Forward**

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The Way Forward requires a collaborative effort, where all mainstream stakeholders and Indigenous Nations are engaged in achieving a shared vision.

This report identifies the issues, concerns and recommendations of Indigenous peoples. They require a response from the MDBC and the Ministerial Council so a clear agenda can be established.

Memorandums of Understanding (MOU's), protocols and agreements are a starting point to provide a pathway for the way forward.

However, statutory recognition of Indigenous Nations as Traditional Owners and sovereign people was seen as fundamental to progress.

Adequate resources and appropriate infrastructure for Indigenous Nations to undertake community capacity building activities also are essential.

Detailed steps are contained in the recommendations.

## **Attachment 1**

### **Consolidated Community Responses**

#### **What is your vision for the River Murray?**

Consistent responses were;

1. The cultural and spiritual significance of the river system to Indigenous people should be recognised, respected and accepted. “The land and rivers and the people are one.”
2. The river system should provide life to all.
3. It should be alive, healthy and free-flowing. “It should come back to life from the reeds to the insects.” “So that the black cockatoo returns to our country.” “The cod needs to continue from the mountains to the sea.”
4. The river should be brought back to its natural flow cycle.
5. People should be able to drink straight from the river. It should be clear, so you can see the bottom, and there should be sandy beaches.
6. The total ecosystem, including tributaries, should be respected.
7. The river’s resources should be used sustainably and protected for future generations.
8. Cultural heritage is respected and protected. Traditional custodial responsibilities can be discharged.
9. Indigenous people are responsible for ensuring cultural heritage is protected, and are employed to do so.
10. Traditional Owners should have access to significant sites and areas. There should be no barriers to continuing their cultural practice.
11. Traditional rights to fish and hunt are accepted.

12. The relationship between environmental and cultural and spiritual values is understood and accepted.
13. Native fish, birds, animals and plants abound.
14. Water is passed on in a good state to those downstream.
15. The river is free from blue-green algae.
16. The river is not polluted.
17. There is a better understanding and relationship between Traditional Owners, government and the community. Traditional Owners, government and the community come together in the long-term to protect the river system.
18. Traditional Owners are part of all decisions that affect the health of the river system.
19. Regulations about use of the river's resources are strictly enforced.
20. There are education campaigns about how to use the river system sustainably and the connection of Traditional Owners to their country.
21. Introduced fish and plants should be controlled and removed

**What is the significance of the River Murray to you?**

Consistent responses were:

1. The river is central to the culture of Indigenous Nations who have traditional custodial responsibility for the Basin. It provides their identity and their spirituality. "It is our lifeblood". "It is life". "Our beliefs are entwined in the river itself".
2. The river system is integral to song-lines and creation stories. It is the source of totems for groups and individuals.

3. The Basin contains many places of significance – burials, mounds, initiation sites, men's and women's places, ceremony grounds, meeting and gathering places.
4. The Basin is rich in relics and artefacts, middens, ochre grounds, camping sites, ovens, scar trees.
5. As the health of the river declines, Indigenous culture is eroded and diminished. Traditional Owners are devastated at loss of native fauna and flora and pollution of the river. Cultural and spiritual values are linked inextricably to environmental values.
6. The river helped to establish relationships between Indigenous Nations. There is an obligation on those upstream to provide good water to those downstream.
7. It provides connection between Indigenous Nations. It was a trade route and still is a highway.
8. The river has major economic importance. It is a source of food, fibre, water, medicine and other sustenance.
9. It also can help to generate greater economic independence. There are commercial opportunities in eco-tourism, cultural tourism, native nurseries and seed collection.
10. The decline in the health of the river system therefore has led to a decline in the economic position of Indigenous people. There are less cod, yabbies, mussels, eggs, plants and animals. Less traditional food sources and reduced commercial opportunities mean a fall in the standard of living and greater reliance on welfare.
11. The river is a place of healing. It provides a sense of balance and relief from stress and sickness.
12. The river provides social connection between Indigenous people and with non-Indigenous people. It is a source of recreation and can be a vehicle for reconciliation.
13. The whole river system is significant. It must be treated as a single ecosystem. Everything is connected and everything has

its place. Wetlands are the nursery for life in the river. Land clearing leads to salinity and destroys biodiversity.

14. The river is critical to health and welfare. Communities need a clean and reliable water supply.
15. The river is a source of cultural education for Indigenous youth. It creates opportunities to put young people in touch with their culture and move away from the cycle of alcohol, drugs, domestic violence and sexual abuse.
16. The river is important for future generations. It provides history and culture, continuity and connection.
17. Traditional Owners are absolutely frustrated and devastated that their cultural responsibilities for care of the Basin are not recognised properly by government and the community.

### **What are the values that should be preserved?**

Consistent responses were:

1. The river system has cultural, spiritual, environmental, social and economic values. All should be protected and preserved. Their significance is detailed in the previous section.
2. The whole system must be treated with respect. If it is in poor health, it can not provide cultural, spiritual, environmental, social or economic benefits.
3. The natural cycles of the river are very important. There must be times of flood and dry. If water levels remain high, trees and other vegetation will drown. If levels are kept low, trees and vegetation will die of thirst. There must be balance to the cycles.
4. The Basin must be managed on a sustainable basis. Resources must be used within their capacity so they can be maintained into the future.
5. The tributaries of the Murray are all part of the river system. The system must be approached as a whole. There are

complex inter-relationships that must be recognised between seasons, river flows, fish, plants and animals.

6. The river provides bush medicines and is essential to the physical and spiritual health of communities in many ways.

### **What is a healthy river?**

Consistent responses were:

1. The whole river system must be treated with respect and its resources used in a sustainable way.
2. There must be a “whole of landscape” policy approach.
3. There must be a long-term vision and long-term management.
4. There must be strong natural flows of water that flush the system regularly and keep the river mouth open.
5. If the river is healthy, culture and spirituality will be strong.
6. Water should be clear and drinkable.
7. Salinity must be reduced and water quality improved.
8. Native fish, animal, bird and plant species should abound.  
“We should be able to see the cod and hear the frogs. There should be plenty of yabbies and mussels. There should be reeds, catfish and birds. The grasses should come back.”
9. Flows should coincide with breeding seasons at the right time of the year.
10. Wetlands (nurseries) should be healthy.
11. Barriers to natural flows should be reduced – dams, locks and weirs.
12. Natural cycles of wet and dry should exist.
13. Water should be free of chemicals, pollution and algae.

14. Turtles should be free of algae.
15. There should be no black mud at the bottom of the river.
16. Introduced species such as carp and willows should be controlled and removed.
17. River-banks should be stable and protected from erosion.
18. Stock should be controlled so the impact of watering points is reduced. There needs to be fencing all along the river.
19. There should be no rubbish in the river.
20. There should be public education programs so everyone is aware of the importance of the river system and how everything is inter-related.

**How should the river's resources be used? What interests should be recognised?**

Consistent responses were:

1. The river's resources should be respected and used in a sustainable way.
2. The resources should be protected for future generations.
3. The resources should be shared between all interests. They should not be locked up, but they should be used within their capacity.
4. The first priority should be to ensure sufficient quantities and quality of water for human consumption.
5. There is a responsibility on those upstream to ensure those downstream receive good water.
6. Management decisions should maintain the biodiversity of the total catchment.

7. The custodial responsibilities of Traditional Owners must be recognised by government and the community. Lack of recognition causes great frustration and pain. “The scales are now unbalanced and our Ancestors are unhappy and restless. They will stay this way until balance is restored.”
8. Traditional Owners must be centrally involved in decisions about resource use in the Basin.
9. There should be water allocations for Indigenous Nations to enable them to discharge their custodial responsibilities.
10. The economic values of the river system should not be placed ahead of spiritual, cultural, environmental or social values. Management decisions should take all values into account.
11. Indigenous interests should be recognised according to traditional Nation boundaries. The unique governance structure of each Nation also needs to be recognised and protocols developed with each Nation about how they want to do business.
12. The intellectual property rights of Traditional Owners need to be recognised and accepted. They apply to particular knowledge about the properties of the natural world.
13. Efficiency of water use must be improved. Flood irrigation and open channels are inefficient.
14. Technology should be adopted to a greater extent to improve efficiency eg drip-feed irrigation.
15. There should be government assistance available to improve the efficiency of water use. Where there is public benefit, there should be public investment.
16. However, no compensation should be paid to industry for any loss of water access. Rights to water are a general community right. No-one owns water resources. No compensation was paid to Indigenous people for loss of their country.
17. Farmers will stay, but their management systems will have to keep on improving.

18. Management of water resources and the Basin as a whole needs to improve. There should be a “whole of government” approach because the Basin’s ecosystem is regulated by many agencies. Cooperation and coordination between the Commonwealth, States, the ACT and Local Government are essential.
19. Government should develop partnerships and agreements with the community, including Traditional Owners, to apply sustainable resource use principles and plans.
20. Agreements about resource use, particularly water use, should be monitored and penalties apply if the terms are breached.
21. Regulations about resource use need to be enforced effectively.
22. Water used by industry should be re-cycled and not pollute the river system.
23. River-banks should be fenced and the number of stock watering points should be reduced.
24. Comprehensive public education programs are required to ensure the community understands what is required for sustainable resource use.

### **What’s wrong with the River Murray now?**

Consistent responses were:

1. The river system is not being treated with the respect it is due.
2. Too much water is being taken out of the river system.
3. There is not enough natural flow to keep the mouth of the Murray open or to flush the river system. Infestations of blue-green algae have increased and water in some areas of the system is stagnant.

4. Water quality has fallen greatly. The water is undrinkable now.
5. Pollution by industry has increased. There is not enough oxygen in the river. There is too much sediment and black mud.
6. Salinity has increased and the water table is rising.
7. The amount of native fish, bird, plant and animal life has fallen and native species remain under threat.
8. Introduced species are increasing in number, particularly carp and willow trees.
9. Erosion of river banks has increased. Contributing factors include land clearing, artificially high flows, artificially high river levels, carp and wash from boats. In some areas, the river is twice as wide as it used to be.
10. Because the environmental values of the river system have been reduced, cultural values have been eroded. Spiritual connection to country and the living world is being lost.
11. Traditional Owners do not have access to sites and areas of cultural significance. As a result, it is harder to teach young people about their culture.
12. The Ministerial Council's reference points for greater environmental flows only give a low to moderate probability of improving the health of the river system. Scientific advice is that an extra 4,000 gl would be needed to give a moderate chance of restoring a healthy system.
13. The science of natural resource management does not incorporate Indigenous cultural knowledge.
14. Indigenous spiritual connection to the river system is not recognised or accepted.
15. Historical knowledge is not respected and utilised properly.

16. The need for agreement between members of the Ministerial Council slows down government decisions.
17. There is no “whole of government” approach. Many agencies have interests in the Basin and their approach needs to be better coordinated and integrated. The Ministerial Council should accept its responsibility to improve things.
18. Those upstream don’t always accept responsibility for their actions.
19. Regulations about water use and quality are not enforced effectively.
20. Illegal fishing is reducing native fish stocks.
21. Water is not always used efficiently. Evaporation rates are high and much irrigation is wasteful, particularly flood irrigation. The rice, cotton and wine industries are greedy about water.
22. The price of water and management decisions about its use do not fully reflect cultural, spiritual, environmental and social values. Neither do catchment management plans.
23. Natural cycles of flood and dry do not occur. Regulators prevent flooding in many areas.

**What are specific areas of cultural significance along the River Murray?**

Consistent responses were:

1. The entire river system and Basin are culturally significant to Indigenous people. The system should be recognised as a cultural landscape.
2. Significant sites are found from the river-banks to the flood plains to the sand hills.
3. Some Elders hold special knowledge about particular places.

## **How should Indigenous interests in the River Murray be recognised?**

Consistent responses were:

1. The custodial responsibilities of Traditional Owners to care for the river system must be recognised by government and the community.
2. There should be respect for traditional knowledge. It can help greatly to improve sustainable management.
3. Traditional knowledge should be accepted as an Intellectual Property Right.
4. Indigenous Nations must be centrally involved in management decisions about the river system within their Nation boundaries. They must be involved right from the beginning.
5. Management decisions within the Basin should incorporate cultural, spiritual, natural and social values, as well as economic values.
6. Natural cycles should be restored in the river system. This will replenish natural and cultural values.
7. Each Indigenous Nation should be granted a water allocation in recognition of its cultural responsibility to care for the river system. The allocation could be used to increase environmental flows, depending on the health of the river system. If the river is healthy, it could be used to improve the economic position of the Nation.
8. Each Indigenous Nation has its own unique governance structure that determines how it will engage with government and the community.
9. There should be protocols with different Nations about how they want to do business and how they will engage in natural resource management in the Basin.

10. The draft Memorandum of Understanding between the MDBC and MLDRIN is a good starting point and should be endorsed by the MDBC. It also should be endorsed by the Commonwealth, the States on the Ministerial Council and the ACT.
11. Each Indigenous Nation should develop a Cultural Heritage Management Plan (CHMP) to apply within its boundaries.
12. CHMPs should have the force of law and be a part of each regional/catchment plan within the Basin. They need to reflect the inter-relationship between environmental, cultural and spiritual values.
13. There must be adequate resources to develop and implement the CHMPs. Funds should be available for workshops and negotiations between Indigenous Nations, government, private landholders and the community.
14. The CHMPs should be implemented by Indigenous Nations. They may entail the development of a series of agreements with landholders, local government, the State/Territory etc.
15. The CHMPs should provide for access by Traditional Owners to sites and areas of cultural significance and for hunting and fishing.
16. Monitoring should be an essential component of CHMPs and should be undertaken by Indigenous rangers. Training programs will be necessary.
17. Indigenous Nations should be represented on all natural resource management bodies that have interests within their traditional boundaries.
18. There should be resources to provide a support network for Indigenous representatives on natural resource management bodies.
19. There also is a need for capacity building and community development within Indigenous Nations so they can contribute effectively to sustainable resource management.

20. The boundaries of Indigenous Nations should be recognised in signage and other public information.
21. The use of traditional place-names should be encouraged, in consultation with Traditional Owners.
21. School curricula should include local Indigenous history.
22. The importance of Indigenous cultural heritage should be promoted in public information and education.
23. Cultural training should be undertaken at all levels of government and within natural resource management bodies.

## Attachment 2 MLDRIN Position Paper

### The Living Murray

The issues are those as determined by members of the Murray Lower Darling Rivers Indigenous Nations. Words as highlighted are icons to the core interests of Indigenous peoples.

#### Issues Log for Indigenous Peoples

1. Acknowledgement of Indigenous connection to lands and waters is based on their own view of Creation and this is reflected within a spiritual web that is linked to important places and ceremony
2. Elders are held with Indigenous society with respect and this needs to be given empowerment through an effective decision making role. Their collective and individual knowledge bank has been passed on through many generations of living within their lands and waters. This knowledge or intellectual property and values need to be held and imparted with the utmost respect and protection.
3. Indigenous Nations need recognition and respect as having inherent rights that are unique to their country. It is the responsibility of each Nation to hold on to their sovereignty, their autonomy and their rights to self-government.
4. Indigenous Nations have the ability to provide advocacy through strong processes that provides unity and co-operation. A process that provides for their united voice. Indigenous Nations are committed to a shared vision for the future through ensuring consultation on all levels and sharing of knowledge.
5. Indigenous Peoples hold a holistic concept to their lands and waters which are seen as different to the

**western value systems. We can learn to co-exist through the development of protocols which acknowledge the unique interests of Indigenous Nations and its people. These can be incorporated within processes and procedures of natural resources wealth sharing which includes water with Indigenous Nations.**

**They include the need for:**

- **Recognising the need for justice**
- **Establishing a package of rights**
- **Development of reparation and compensation**
- **Embracing Indigenous self determination**
- **Development of an economic base for Indigenous Peoples**
- **Ensuring cultural and environmental heritage protection measures**

Refer to: [www.thelivingmurray.mdbc.gov.au](http://www.thelivingmurray.mdbc.gov.au)

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Responses from each public forum and responses from each Traditional Owner workshop are available in the extended version of this paper available from - [www.thelivingmurray.mdbc.gov.au](http://www.thelivingmurray.mdbc.gov.au)