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## TREADING WATER ON INDIGENOUS WATER RIGHTS: THE SERIOUS DEFICIENCIES OF WATER ALLOCATION PLANNING AND MANAGEMENT IN NSW UNDER THE MURRAY DARLING BASIN PLAN

Sue Jackson, Emma Carmody And Lana Hartwig

*Structural changes made to the Australian water sector since the 1990s have not engaged substantively with Indigenous interests in water, notwithstanding the inclusion of customary rights to water as an incident of native title. The modest policy and regulatory changes made in response to the Mabo decision have failed to address Indigenous water dispossession and, in the Murray-Darling Basin, more recent reforms to Commonwealth water law and policy continue to privilege the interests of non-Indigenous land and water entitlement holders. Indigenous rights and interests are, for the most part, treated as tokenistic 'ornamental extras' in the Water Act 2007 (Cth) and its delegated instrument, the 2012 Murray-Darling Basin Plan. We reviewed 10 surface and groundwater plans from NSW submitted for accreditation under the Basin Plan. NSW was selected because it has the largest Indigenous population of Basin jurisdictions. Indigenous peoples in this part of the Basin comprise almost 10% of the population yet currently own a mere 0.2% of available surface water. We assessed the publicly available water resource plans against the procedural requirements of the Basin Plan which refer to the five inter-related sets of obligations: identifying certain matters; having regard to certain matters; specifying opportunities to strengthen and protect; providing a minimum baseline of legal protection; and consulting about certain matters. Our analysis highlights not only the limited nature of the provisions in the Water Act, but the poor performance of NSW in satisfying even these weak obligations. We argue that opportunities to redress the dispossession of Aboriginal water rights in NSW are being forgone through the implementation of this major reform and that Basin governments have a moral obligation to exceed the minimalist requirements of the current water allocation framework.*

## I INTRODUCTION

The Murray-Darling Basin (**MDB**) encompasses the territories of forty autonomous Indigenous (First) Nations and the region is home to approximately 15% of Australia's Indigenous population.<sup>1</sup> River valleys and their networks of waterways provided natural enclaves for Indigenous societies who over successive centuries of occupation vested the Basin's land and waterways with religious and cultural significance.<sup>2</sup> Through various livelihood strategies, tenurial arrangements and ritual practices, lands and waters were managed sustainably for millennia. Group or joint property rights over land and water regulated access to territory, including rivers and waterholes, and natural resources.<sup>3</sup> In contrast, water sharing in the relatively short settler colonial era (1770 to present) has been the source of intergovernmental and interpersonal contestation and conflict,<sup>4</sup> and in the stories told about the success of agriculture in the MDB,<sup>5</sup> the disastrous and often violent impact of the imposition of settler laws and land uses on First Nations is largely overlooked.

As a nation, we are now more willing to acknowledge that the introduced systems of water regulation have resulted in serious environmental degradation and in some instances, near-ecological collapse.<sup>6</sup> Many Australians support the successive waves of water reform and

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<sup>1</sup> Lana Hartwig, Francis Markham, and Sue Jackson, 'Benchmarking Indigenous water holdings in the Murray-Darling Basin: A crucial step towards developing water rights targets for Australia' (in press) *Australasian Journal of Water Resources*.

<sup>2</sup> Jessica Weir, 'The traditional owner experience along the Murray River' in Emily Potter, Stephen Mackenzie, Alison Mackinnon and Jennifer McKay (eds), *Fresh Water: New Perspectives on Water in Australia* (Melbourne University Press, 2007) 59.

<sup>3</sup> Phillip Allen Clarke, 'Aboriginal Culture and the Riverine Environment' in John Jennings (ed), *The Natural History of the Riverland and Murraylands* (Royal Society of South Australia, 2009) 146-147.

<sup>4</sup> Daniel Connell, *Water politics in the Murray-Darling Basin* (Federation Press, 2007); Lee Godden and M Gunther, 'Realising capacity: Indigenous involvement in water law and policy reform in south-eastern Australia' (2009) 20(5) *Journal of Water Law* 243, 244.

<sup>5</sup> Jessica Weir, *Murray River Country: An Ecological Dialogue with Traditional Owners* (AIATSIS Press, 2010).

<sup>6</sup> Australian Academy of Science, Investigation of the Causes of Mass Fish Kills in the Menindee Region NSW over the Summer of 2018–2019 (Report, February 2019).

legislative changes implemented since the 1990s to reverse some of this ecological decline.<sup>7</sup> Far less public attention is paid to the inequitable distribution of water and the social justice implications of water allocation arrangements embedded in colonial power relations.<sup>8</sup> The early models of Basin water governance excluded Indigenous peoples, enabling colonial water laws to play a pivotal role in their dispossession<sup>9</sup> and giving rise to an enduring system of water governance that Hartwig et al. describe as ‘water colonialism’.<sup>10</sup> Major structural and distributive changes introduced to the water sector in the 1990s and early 2000s did not engage substantively with Indigenous interests in water, notwithstanding the inclusion of customary rights to water as an incident of native title.<sup>11</sup> Since then, modest policy and regulatory changes have largely failed to address Indigenous water dispossession,<sup>12</sup> instead perpetuating the status quo which privileges the interests of non-Indigenous land and water entitlement holders.<sup>13</sup>

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<sup>7</sup> Barry Hart et al, *Murray-Darling Basin, Australia: Volume 1: Its Future Management* (Elsevier, 2020).

<sup>8</sup> Sue Jackson, ‘Enduring injustices in Australian water governance’ in Anna Lukasiewicz, Stephen Dovers, Libby Robin, J M McKay, Steven Schilizzi and Sonia Graham (eds), *Natural Resources and Environmental Justice: The Australian Experience* (CSIRO Publishing, 2017) 121-132; Virginia Marshall, *Overturing Aqua nullius: Securing Aboriginal Water Rights* (Aboriginal Studies Press, 2017); Jessica Weir, ‘Water Planning and Dispossession’ in Daniel Connell and R Quentin Grafton (eds), *Basin Futures: Water Reform in the Murray-Darling Basin* (ANU E Press, 2011).

<sup>9</sup> Marshall (n 8); Weir, ‘Water Planning and Dispossession’ (n 8).

<sup>10</sup> Lana Hartwig et al, ‘Water colonialism and Indigenous water justice in south-eastern Australia’ (2021) *International Journal of Water Resources Development* 1.

<sup>11</sup> Lee Godden, Sue Jackson and Katie O’Byrne, ‘Indigenous water rights and water law reforms in Australia’ (2020) 37(6) *Environmental Planning & Law Journal*, 655; Poh-Ling Tan and Sue Jackson, ‘Impossible Dreaming - does Australia’s water law and policy fulfil Indigenous aspirations?’ (2013) 30(2) *Environment and Planning Law Journal* 132; Godden & Gunther (n 4).

<sup>12</sup> Lana Hartwig, Sue Jackson, and Natalie Osborne, ‘Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession’ (2020) 99 *Land Use Policy* 1; Weir, ‘Water Planning and Dispossession’ (n 11).

<sup>13</sup> Weir, ‘Water Planning and Dispossession’ (n 8); Hartwig et al (n 10).

The *Water Act 2007* (Cth) (**Water Act** or **Act**) and its delegated instrument, the 2012 Murray-Darling Basin Plan (**Basin Plan** or **Plan**), were heralded as innovative reforms. They were also creatures of the post-Mabo era and as such presented an historic opportunity to not only set water management on a sustainable footing, but to finally advance Indigenous water rights across the MDB. Unfortunately, the moment was not seized: extractions remain unsustainably high,<sup>14</sup> and compliance with Basin Plan processes has been low in places, notably NSW.<sup>15</sup> The central statutory regimes for water use throughout south-eastern Australia continue to provide only limited recognition of Indigenous interests in their water allocation and distribution frameworks.<sup>16</sup> Indigenous rights and interests are for the most part treated as ‘ornamental extras’ in the Act, Plan and associated catchment-scale instruments known as ‘water resource plans’ (**WRPs**). Indeed, this latest wave of reform, much like corporate greenwashing, has been crafted to create the impression of progress – for example focusing on consultative processes – without delivering any concrete outcomes for the First Nations that span the length and breadth of Australia’s largest river basin.<sup>17</sup>

Despite – or perhaps because of – these deficiencies, Basin states and territories (Queensland, NSW, Victoria, ACT and South Australia) have a moral obligation to exceed the minimalist requirements of the Act and Plan and to implement meaningful policies which reverse Indigenous water dispossession. This is particularly true in the NSW part of the MDB, where the amount of water held by First Nations organisations has declined by 17.2% over the past decade.<sup>18</sup> As a consequence, Indigenous peoples in this part of the Basin currently own a mere 0.2% of available surface water despite comprising almost 10% of the population.<sup>19</sup> As WRPs in NSW are yet to be finalised and accredited under the

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<sup>14</sup> Australian Academy of Science (n 6).

<sup>15</sup> Godden, Jackson & O’Byrne (n 11) 665.

<sup>16</sup> Godden & Gunther (n 4); Tan & Jackson (n 11).

<sup>17</sup> Katie O’Byrne, *Indigenous Rights and Water Resource Management: Not Just Another Stakeholder* (Routledge, 2019).

<sup>18</sup> Hartwig, Jackson and Osborne (n 12).

<sup>19</sup> *Ibid.*

Water Act, the State Government has a genuine opportunity to move beyond the window dressing of non-binding clauses and an outdated consultation paradigm, to instead facilitate substantive change, including the redistribution of water to First Nations.

The aim of this paper is therefore to assess the progress made implementing the Indigenous related provisions of the new water allocation planning and management measures enacted by the Basin Plan in the NSW portion of the MDB. The article is organised as follows. First, we briefly introduce the water management framework of the MDB, focusing on the central role of water allocation planning. We then describe in greater detail how Indigenous rights and interests are addressed under the Water Act and Basin Plan. In the substantive section to follow we examine the available NSW Water Resource Plans submitted under the Water Act against the requirements of the Basin Plan. Recommendations for reform are made in the final section.

## II THE WATER MANAGEMENT FRAMEWORK OF THE BASIN

The Water Act was passed by the Howard government at the height of the Millennium Drought (1997-2009) with the chief objective of reinstating an ‘environmentally sustainable level of take’ (**ESLT**) across the ailing MDB. It proposed to do this by establishing an overarching legal framework for Commonwealth governance of the Basin, a core component of which was the creation of the Murray-Darling Basin Authority (**MDBA**) and the Commonwealth Environmental Water Holder (**CEWH**). The former was charged with drafting and implementing the Basin Plan, which set limits on water extraction for each of the major catchments across the MDB; the latter with managing water licences purchased from farmers and reallocated to the environment, with this reallocation serving to achieve the new extraction limits set out in the Plan.

Basin States have continued to play a major role in surface water and groundwater allocation and management across the MDB, notably through the preparation of WRPs for defined catchments (or **WRP areas**)<sup>20</sup> within their territory. WRPs, which are legislative instruments,

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<sup>20</sup> Across the Basin, there are 33 WRP areas; 19 surface water and 19 groundwater, including five which overlap both. See Murray-Darling Basin Authority, *Water resource plans – May 2021 Quarterly*



are arguably the most important element of the MDB water reform package insofar as they give effect to the core requirements of the Basin Plan (including extraction limits for surface water and groundwater resources within each catchment area). As such, they are required to comply with specific provisions in both the Water Act and Basin Plan, including in relation to 'Indigenous values and uses'. What follows is an analysis of the deficiencies of these provisions.

### III INDIGENOUS 'RIGHTS' UNDER THE WATER ACT AND BASIN PLAN

While the Water Act compels the reallocation of water to the environment to reinstate an ESLT, it does not include any requirement to address the claims of First Nations for water rights. Indeed, when the statute was enacted, it failed to include an express reference to Indigenous interests in water, beyond a 'savings' provision concerning the interaction between the Water Act and the *Native Title Act 1993* (NTA).<sup>21</sup>

Several commentators have noted the limitations of the Act, including the fact that there was 'little, if any, consultation with Indigenous people in relation to its development'.<sup>22</sup> The Act was amended following review in 2014 and improvements were made to the Indigenous representation on the Basin Community Committee.<sup>23</sup> Indigenous representation was further enhanced in February 2019 when, after some delay, an amendment required the appointment of an Indigenous member to the MDB Authority.<sup>24</sup>

The interests of Indigenous people are acknowledged in s 21(4)(c)(v) of the Act. O'Bryan<sup>25</sup> notes that they are merely one of several matters in sub-s (v) to which the MDBA and the

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*Report* (Report, June 2021) 1 <<https://www.mdba.gov.au/sites/default/files/pubs/water-resource-plan-quarterly-report-may-2021.pdf>>.

<sup>21</sup> See *Water Act 2007* (Cth) s 13.

<sup>22</sup> O'Bryan (n 20) 65; Godden & Gunther (n 4).

<sup>23</sup> *Water Act 2007* (Cth) s 202(5)(c).

<sup>24</sup> *Ibid* s 177(b).

<sup>25</sup> O'Bryan (n 17) 90.

Minister must 'have regard' in preparing the Basin Plan, the others being 'social, cultural, and other public benefit issues'. This is compounded by the fact that sub-s (v) itself is only one of ten matters listed in s 21 (4)(c).<sup>26</sup> The Basin Plan is specifically required to provide information about use of Basin water resources by Indigenous people (s 22 (1)). Godden et al 2020<sup>27</sup> argue that the benefit of this clause is that those uses must be ascertained, which necessarily implies consultation with Indigenous people, however there are no obligations regarding what is to be done with the information once it has been included in the Basin Plan.<sup>28</sup> Significantly, neither s 21 nor s 22 actively facilitates Indigenous participation in the management of the Basin's resources.<sup>29</sup>

Under the Water Act, State and Territory governments are responsible for developing proposed WRPs for defined water management areas,<sup>30</sup> which must meet the requirements stipulated in Chapter 10 of the Basin Plan. Each WRP comprises locally specific rules as to how available water is allocated at a catchment level. The rules include setting limits on water to be withdrawn from the system, the water available to the environment, and measures for compliance with water quality standards.<sup>31</sup> State and Territory governments submit prepared WRPs to the MDBA for accreditation, which subsequently prepares recommendations to the Commonwealth Minister as to whether the plan should be adopted<sup>32</sup> based on consistency with the Basin Plan.<sup>33</sup> Part 14 of Chapter 10 relates to Indigenous values and uses in WRPs, with this being the focus of our analysis in the next section.

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<sup>26</sup> O'Bryan (n 17) 91.

<sup>27</sup> Godden, Jackson & O'Bryan (n 11) 667.

<sup>28</sup> O'Bryan (n 17) 91,

<sup>29</sup> O'Bryan (n 17) 91.

<sup>30</sup> *Basin Plan 2012* (Cth).

<sup>31</sup> See generally, *Water Act 2007* (Cth) ss 54–70.

<sup>32</sup> *Water Act 2007* (Cth) s 63.

<sup>33</sup> *Ibid* s 55.

Part 14 includes requirements that relate specifically to consultation with Indigenous peoples and/or organisations within regional water management areas. These consultation requirements compel Basin States to 'have regard to' Indigenous views about a range of matters. In the preparation of WRPs, these matters may be summarised as:

- objectives and outcomes based on Indigenous values and uses (sec 10.52)
- consultation and preparation of WRPs relevant to native title matters; registered Aboriginal heritage; Indigenous representation and the encouragement of active and informed participation; social, cultural, spiritual and customary objectives, and strategies for achieving these objectives; risks to Indigenous values and uses (sec 10.53)
- cultural flows (sec 10.54)
- retention of the current level of protection of Indigenous values and uses (sec 10.55).

Section 10.54 refers to cultural flows which are a relatively new water management concept. In the 2000s, First Nations leaders across the Basin developed the concept of cultural flows 'to speak to policy-makers accustomed to the terminology of environmental flows'.<sup>34</sup> Weir explains that by using the word 'cultural', First Nations assert their 'distinct Indigenous identity and political status' in contests over water allocation and management.<sup>35</sup> The concept was formally defined in 2007 to mean 'water entitlements that are legally and beneficially owned by the Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, natural, environmental, social and economic conditions of those Nations'.<sup>36</sup> This definition is acknowledged in Schedule 1 to the Basin Plan, which describes uses of the Basin's water resources, but not as a formal legislative definition that State and Territory jurisdictions are required to adopt.

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<sup>34</sup> Weir (n 5) 124.

<sup>35</sup> Ibid 244.

<sup>36</sup> Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows* (Web Page) <<https://www.mldrin.org.au/what-we-do/cultural-flows/>>.

A note to Chapter 10 Part 14 sees the MDBA engage with two Indigenous water alliances within the Basin, the Murray Lower Darling Rivers Indigenous Nations (MLDRIN) and Northern Basin Aboriginal Nations (NBAN),<sup>37</sup> to provide advice on the adequacy of each WRP in meeting these requirements. Their advice is submitted unaltered to the MDBA members and then considered by the MDBA when it prepares its recommendations for the Minister.

As noted above, the ‘obligations’ arising out of Part 14 of Chapter 10 are attenuated by the use of the phrase ‘have regard to’. This phrase has been subject to some considerable discussion, including in relation to Indigenous interests,<sup>38</sup> leading to the adoption by the MDBA of a Position Statement (referred to as 1B).<sup>39</sup> In that statement, the MDBA established three categories of ‘obligation’ arising from this phrase, ranging from consideration of the matter at hand to ‘consideration’ coupled with some additional descriptive material in each WRP. The matters concerning Indigenous values and uses are placed in Category A, the least onerous.

The MDB Royal Commission interpreted this Position Statement in the following terms: ‘The effect is that the MDBA considers that the duty of Basin States is at the minimum level of ‘have regard’, with no need for WRPs to describe or explain how it was met or to include any other additional material’.<sup>40</sup> This is consistent with High Court jurisprudence, which provides that the phrase, while requiring a decision-maker to give genuine consideration to the specified issue, does not impose an obligation to take any substantive action in relation

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<sup>37</sup> MLDRIN and NBAN led the assessment process for the surface water and groundwater WRPs that fall in the Southern Basin and Northern Basin, respectively. Where this distinction was not straightforward (e.g., NSW MDB Fractured Rock WRP, NSW MDB Porous Rock WRP, and Darling Alluvium WRP), it was agreed that the organisation covering the area with the greater number of Nations would lead the assessment.

<sup>38</sup> See eg, *Royal Commission into the Murray-Darling Basin Plan* (Final Report, 29 January 2019).

<sup>39</sup> Murray-Darling Basin Authority, *Basin Plan Water Resource Plan Requirements – Position Statement 1B – Interpreting ‘have regard to’* (Position Statement No 1B, 23 March 2017) <[https://www.mdba.gov.au/sites/default/files/pubs/WRP-Position-Statement-1B-Interpreting-have-regard-to\\_0.pdf](https://www.mdba.gov.au/sites/default/files/pubs/WRP-Position-Statement-1B-Interpreting-have-regard-to_0.pdf)>.

<sup>40</sup> *Royal Commission into the Murray-Darling Basin Plan* (n 38) 487.

to that issue (such as acting on the basis of best-available information about Indigenous values).<sup>41</sup> We may therefore deduce that the phrase has been employed to avoid any consequential outcome, action, or addition to a WRP that would interfere with other, consumptive uses. It is a position supported by the conclusion of the Commissioner Bret Walker SC who considered that the MDBA's Position Statement "is suggestive of discriminatory treatment, and it must be understood as disrespectful to Aboriginal people".<sup>42</sup>

These shortcomings, while significant, do not prevent Basin States from taking proactive steps to introduce more substantive obligations in WRPs to address Aboriginal water dispossession. Indeed, Part 14 of Chapter 10 includes a provision which invites Basin States to (at their discretion), 'strengthen protection of Indigenous values and uses' in their respective WRPs.<sup>43</sup> However, and as we will show for NSW at least, Indigenous 'values and uses' are not given proper and genuine consideration and protection is certainly not bolstered in any meaningful fashion.

#### IV NSW WATER RESOURCE PLANS AND THE INDIGENOUS SPECIFIC REQUIREMENTS OF THE BASIN PLAN

At the time of writing, NSW – which is responsible for preparing the greatest number of WRPs – is the only Basin government that has not had its plans accredited and made law. Having benefited from several extensions, it finally submitted all 20 of its draft WRPs to the MDBA between March and June 2020.

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<sup>41</sup> See eg, *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 540 [105], in which Gleeson CJ and Gummow J stated that the phrase required decision-makers to give "genuine" consideration to the prescribed factors and "to bring to bear on those issues a mind that was open to persuasion."

<sup>42</sup> *Royal Commission into the Murray-Darling Basin Plan* (n 37) 487.

<sup>43</sup> *Basin Plan 2012* (Cth) cl 10.52(3).

However, by April 2021 it became apparent that most WRPS would need to be withdrawn due to inconsistencies with the Basin Plan<sup>44</sup> and by the time of publication, NSW had withdrawn 17.<sup>45</sup>

While WRPs must meet the requirements set by the Basin Plan, the process and formulation of doing so is up to each State and Territory.<sup>46</sup> Rather than stand-alone plans, the NSW WRPs operate like a large compendium, directing readers to clauses and sections of numerous Schedules, Attachments, and other instruments to demonstrate compliance with each Basin Plan requirement. With NSW WRPs containing up to 10 Schedules, some around 300 pages in length,<sup>47</sup> they are long and complex documents.

NSW's approach to WRPs relied heavily on its established water management framework; specifically, its Water Sharing Plans (**WSPs**). WSPs set rules for how water is to be distributed between different uses of a defined water source (such as town supply, rural domestic supply, stock watering, industry, irrigation, and the environment) and are legally binding under the *Water Management Act 2000* (NSW).<sup>48</sup> Importantly, WSPs operate independently from WRPs under state laws. But, in preparing WRPs, NSW reviewed and amended and/or replaced its WSPs to address some Basin Plan requirements, including alignment with WRP areas.<sup>49</sup> Some of these amended WSPs have been gazetted in NSW under state water laws, despite the fact that they have not yet been accredited for the

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<sup>44</sup> Emma Carmody and Huw Calford, 'NSW's Overdue Water Resource Plans Hampered by Further Delays', *Environmental Defenders Office* (Blogpost, 23 April 2021) <[edo.org.au/2021/04/23/nsws-overdue-water-resource-plans-hampered-by-further-delays/](https://edo.org.au/2021/04/23/nsws-overdue-water-resource-plans-hampered-by-further-delays/)>.

<sup>45</sup> Murray-Darling Basin Authority, 'Murray-Darling Basin Authority Communique', *Australian Government* (Communique, 31 August 2021) <<https://www.mdba.gov.au/media/mr/murray-darling-basin-authority-communique-30AUG2021>>.

<sup>46</sup> 'Murray-Darling Basin Authority', *Water Resource Plans* (Web Page) <https://www.mdba.gov.au/basin-plan-roll-out/water-resource-plans>.

<sup>47</sup> These specific examples are taken from the Macquarie Castlereagh Surface Water WRP but are typical of other surface water WRPs.

<sup>48</sup> *Water Management Act 2000* (NSW) ch 2 pt 3.

<sup>49</sup> For example, separate WSPs now exist for unregulated systems and groundwater systems, whereas previously, these were combined.

purposes of the Water Act<sup>50</sup> (and may not satisfy the requirements of the Basin Plan, which would, *inter alia*, give rise legal concerns of a constitutional nature).<sup>51</sup> One or more WSP is accordingly attached to each NSW WRP in Schedule A.

We reviewed 10 of NSW's surface and groundwater WRPs<sup>52</sup> submitted for accreditation and available on the MDBA website (as of June 2021). We assessed them against the requirements of the Basin Plan listed in Table 1 which refer to five inter-related sets of obligations: identifying certain matters; having regard to certain matters; specifying opportunities to strengthen and protect; providing a minimum baseline of legal protection; and consulting about certain matters.

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<sup>50</sup> See for example the *Water Sharing Plan for the Barwon-Darling Unregulated Water Source 2012* (NSW).

<sup>51</sup> By virtue of the operation of *Australian Constitution* s 109.

<sup>52</sup> Barwon-Darling Watercourse; Intersecting Streams; Macquarie Castlereagh (surface water); Macquarie Castlereagh (alluvium); Darling Alluvium; Lachlan Alluvium; Murray Alluvium; MDB Fractured Rock; Murrumbidgee Alluvium; Great Artesian Basin Shallow.

| <b>Section of Chapter 10,<br/>Part 14</b> | <b>Requirement of a water resource plan</b>  |
|---|--|
| 10.52(1)(a)                               | Identify objectives of Indigenous people in relation to managing the water resources of the WRP area   |
| 10.52(1)(b)                               | Identify outcomes for the management of the water resources that are desired by Indigenous people  |
| 10.52(2)                                  | In identifying these objectives and outcomes, regard must be had to Indigenous peoples' social, spiritual and cultural values and uses of the water resources of the WRP area, as determined through consultation  |
| 10.52(3)                                  | A person or body preparing a WRP may identify opportunities to strengthen protection of Indigenous values and uses   |
| 10.53                                     | A WRP must be prepared having regard to the views of relevant Indigenous organisations with respect to these matters: native title; cultural heritage; Indigenous representation; social, cultural, spiritual and customary objectives and strategies for achieving these; active and informed participation; and risks to Indigenous values and uses. |
| 10.54                                     | A WRP must be prepared having regard to the views of Indigenous people with respect to cultural flows  |
| 10.55                                     | A WRP must provide at least the same level of protection of Indigenous values and uses as provided in <ul style="list-style-type: none"> <li>a) A transitional WRP for the WRP plan area</li> <li>b) An interim WRP for the WRP plan area</li> </ul>   |

**Table 1. Requirements of WRPs relating to Indigenous interests**



In doing so we took account of the MDBA's Position Statement 14a (Aboriginal values and uses)<sup>53</sup> and its WRP Guidelines for Chapter 10, Part 14.<sup>54</sup> The Guidelines were recommended by the independent review of the Water Act in 2014<sup>55</sup> and developed by the MDBA with input from representatives of MLDRIN and NBAN.<sup>56</sup> We also drew on publicly available assessments from MLDRIN which is one of the Indigenous organisations that has a formal role in providing advice to the MDBA and Minister on the adequacy of WRPs in meeting the Basin Plan requirements.<sup>57</sup>

The analysis below is organised thematically: identification of (non-binding) Indigenous objectives; strategies for meeting cultural objectives; improving protections; treatment of Indigenous input; and sustainable levels of extraction. Overall, we found that most text was replicated nearly identically across the WRPs and WSPs we viewed, with only plan names and areas differing, suggesting there was little room for First Nations to influence the content of both instrument types.

**(i) Indigenous objectives are non-binding and negligible effort is given to strengthening protection of Indigenous values and uses**

WSPs, which are an important part of WRPs, set out how water is to be shared between different water users (including the environment) at a catchment scale. They include a range of binding provisions regarding overall extraction limits, the circumstances in which water can be diverted by individual licence holders, drought reserves and environmental watering.

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<sup>53</sup> Murray-Darling Basin Authority, *Basin Plan – Water Resource Plan Requirements – Position Statement 14A – Aboriginal values and uses* (Position Statement, No 14A, 14 August 2015) <<https://www.mdba.gov.au/sites/default/files/pubs/WRP-position-statement-14A-Aboriginal-objectives-and-outcomes.PDF>>.

<sup>54</sup> Murray-Darling Basin Authority, *Water Resource Plans – Part 14 Guidelines* (Guidelines, updated 14 January 2021) 1 <<https://www.mdba.gov.au/sites/default/files/pubs/D17-6996-WRP-requirements-Part-14-Aboriginal.pdf>> ('WRP Guidelines').

<sup>55</sup> Eamonn Moran et al, *Report of the Independent Review of the Water Act 2007* (Report, November 2014) 19.

<sup>56</sup> Ibid 2.

<sup>57</sup> These assessments were made available following an Order for Papers resolution of the Legislative Council under Standing Order 52 on 5 May 2021.

They also contain non-substantive objectives and vision statements which do not give rise to any binding obligations in-and-of-themselves. The material effect of NSW's efforts to protect or advance Indigenous interests in water will therefore depend on how Indigenous interests are treated in the substantive sections of WSPs, which we consider in more detail below. First, we comment on the heavy reliance on non-binding sections/clauses to discharge the meagre obligations of the Basin Plan (which itself reflects the dearth of substantive obligations regarding Indigenous rights in the enabling legislation, namely the Water Act).

Although the Basin Plan does not require that WRPs strengthen the consideration of Indigenous values and uses as it relates to Basin water resources, the MDBA acknowledges that it would be 'best practice' to do so.<sup>58</sup> In their Guidelines they provide an example:

... best practice would be to plan to incorporate ways to share economic benefits of water resource development with TOs. While this is beyond the scope of the Basin Plan requirements, there is opportunity and it would be of merit to include it in a WRP.

Yet every WRP we viewed commits to no more than maintaining the status quo and included the following formulaic statement:

For the purpose of section 10.55 of the Basin Plan, this Plan provides for a level of protection of Aboriginal values and Aboriginal uses<sup>59</sup> in the [plan's name] WRP area that is, at a minimum, equal to that which existed under NSW water management arrangements prior to this Plan, as shown in Table 4-2.

Table 4-2<sup>60</sup> in each WRP lists a series of near identical water management arrangements that appear to relate to First Nations values and uses, but notably, only one is listed as an improvement across all surface water plans: 'Acknowledgement of and identification of Indigenous cultural objectives, strategies and performance indicators' in

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<sup>58</sup> Murray-Darling Basin Authority, *Water Resource Plans – Part 14 Guidelines* (n 54) 2.

<sup>59</sup> In some cases, *Indigenous* values and *Indigenous* uses.

<sup>60</sup> Or table with equivalent information in each WRP.

WSPs. This same content was reproduced in every surface water and groundwater WRP to demonstrate maintenance of the status quo or an improvement that, in our view, represents a marginal or negligible advance. Groundwater WRPs include one other claimed 'improvement': Part 9 of their WSP apply rules for managing water supply works near groundwater dependent culturally significant areas. However, in some cases, these rules applied prior to the WRP so do not transparently constitute an 'improvement' as claimed.<sup>61</sup> Moreover, the purported improvement rests heavily on acknowledging Indigenous cultural objectives and 'having regard to' a range of matters, rather than ensuring these objectives and matters are acted upon and satisfied.<sup>62</sup> All the WSPs we viewed listed a formulaic set of 'Aboriginal cultural objectives'. For surface water plans: *'The broad Aboriginal cultural objective of this Plan is to maintain, and where possible improve, the spiritual, social, customary and economic values and uses of water by Aboriginal people'*.<sup>63</sup> Whereas the broad objectives for the groundwater plans did not contain the aspiration, albeit discretionary, to improve outcomes for Aboriginal peoples: *'The broad Aboriginal cultural objective of this Plan is to maintain the spiritual, social, customary and economic values and uses of groundwater by Aboriginal people'*.<sup>64</sup> While both surface water or groundwater WSPs then present near identical but more targeted objectives, none concern 'economic' values and uses. The objectives, strategies and performance indicators that appear in these WSPs are more substantive than previous WSPs, however these non-binding clauses are opaque, difficult to measure, and offer no legal certainty.

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<sup>61</sup> For example, the Murrumbidgee Alluvium WRP (p. 38) asserts that Part 9 of the *WSP for the Murrumbidgee Alluvium Groundwater Sources 2020* is an improvement to existing protection of Aboriginal people's values and uses. However, the interim WRP (*WSP for the Murrumbidgee Unregulated and Alluvial Water Sources 2012*, cl 69) has contained these provisions since 2012, though in some slightly different language.

<sup>62</sup> There is no mandatory requirement in the Basin Plan for steps to be put in place to achieve the Indigenous objectives specified – see O'Bryan (n 17) 92.

<sup>63</sup> *Intersecting Streams Water Resources Plan 2019* (NSW) pt 2 cl 11.

<sup>64</sup> *Water Sharing Plan for the NSW Murray Darling Basin Fractured Rock Groundwater Sources 2020* (NSW) pt 2 cl 11.

Also, significantly, these WSP provisions were not derived through consultation with local Nations,<sup>65</sup> even though WRPs claim otherwise.<sup>66</sup>

Further support for our conclusion that the Basin Plan (and under it, the WRPs) treat Indigenous interests superficially can be found in the decision of the MDBA to not assess “the veracity of the Aboriginal objectives and outcomes and associated values and uses identified in water resource plans” (MDBA Position Statement 14a). Such a position means that any discrepancies in NSW WRPs identified by either NBAN or MLDRIN (or others) would unlikely be acted upon by the MDBA. Uses, values, objectives and outcomes become free-standing items in a process that weakly acknowledges, or has regard for, rather than mandates additions to a WRP and generates consequential outcomes or actions.

**(ii) Strategies for reaching the targeted Aboriginal cultural objectives in WSPs are weak**

As noted, each WSP refers to a set of standard strategies for reaching the targeted Aboriginal cultural objectives. For example, from the Lachlan Alluvial WSP,<sup>67</sup> these are:

- (a) manage access to groundwater consistently with the exercise of native title rights
- (b) provide for groundwater associated with Aboriginal cultural values and purposes<sup>68</sup>

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<sup>65</sup> See, eg, Murray Lower Darling Rivers Indigenous Nations, *NSW Murray Darling Porous Rock Assessment Summary*, (Report, 7 May 2021) 23-24 (‘Porous Rock Assessment Summary’).

<sup>66</sup> Specifically, each WRP states that “That consultation identified the objectives and outcomes listed in the Attachments to Schedule C [First Nations Consultation Reports]. Those objectives and outcomes informed the provisions relevant to Aboriginal people in relation to water management in the [Plan name] WRPA as set out in Part 2 of each of the [Water Sharing Plan/s]”.

<sup>67</sup> *Water Sharing Plan for the Lachlan Alluvial Groundwater Sources 2019* (NSW) cl 11(3), but these are consistent across groundwater WSPs.

<sup>68</sup> The WSP contained the following note: The provisions in Part 7 provide opportunities for Aboriginal people to access water by allowing for the granting of an aquifer access licence of the subcategory “Aboriginal cultural”.

(c) manage extractions under access licences and basic landholder rights within the extraction limits<sup>69</sup>

(d) manage the construction and use of water supply works to minimise impacts on groundwater quality<sup>70</sup>

(e) manage the construction and use of water supply works to minimise impacts on groundwater-dependent culturally significant areas<sup>71</sup>.

These 'strategies' are only effective if they link to substantive requirements, actions or options, and most are not new or any different to provisions that were available in previous WSPs. We accordingly note that native title determinations are largely absent across NSW, and as we will discuss further below, the Barkandji native title determination over the Darling River/Barka has not resulted in any tangible improvements in relation to water rights for Traditional Owners. Similarly, references to 'Aboriginal cultural' licences must be considered within the broader legislative context, which imposes significant limitations on their availability and size.<sup>72</sup> Specifically, 'Aboriginal Cultural Water Access Licences' are a creature of the Water Management Act<sup>73</sup> and clauses in each WSP which explicitly limit the maximum share component of any such licence to 10ML.<sup>74</sup> In this sense, they are limited volumetrically and constrained to certain uses, and to that extent cannot be considered to operate on an equal footing with other licence categories.

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<sup>69</sup> The WSP contained the following note: The provisions in Part 6 manage extraction of groundwater within the extraction limits for the groundwater sources. This helps to protect any culturally significant areas from damage.

<sup>70</sup> The WSP contained the following note: The provisions in Part 9 manage the location, construction and use of water supply works to prevent impacts from sources of contaminated water.

<sup>71</sup> The WSP contained the following note: The provisions in Part 9 manage the location, construction and use of water supply works to prevent impacts on culturally significant areas.

<sup>72</sup> Tan & Jackson (n 11).

<sup>73</sup> *Water Management Act 2000* (NSW) ss 57(2), 61(1)(a); *Water Management (General) Regulation 2018* (NSW) cl 10(1)(g), sch 3.

<sup>74</sup> See eg, *Water Sharing Plan for the Barwon-Darling Unregulated River Water Source 2012* (NSW) cl. 40(1); *Water Sharing Plan for the Lachlan Alluvial Groundwater Sources 2019* (NSW) cl 35(2).

Finally, managing approvals for ‘works’ (for pumps or floodplain structures, for example) to minimise impacts on culturally significant groundwater-dependent sites depends on adequate mapping of cultural values and registration of sites of cultural heritage. In many instances, this work is incomplete, with some Traditional Owners being hesitant to register culturally significant sites. Furthermore, no mechanisms for assessing or measuring impacts on culturally significant groundwater-dependent sites are provided.

We further note that there are no strategies pertaining to Aboriginal economic values and uses. This is linked to the lack of a corresponding ‘targeted’ objective to this effect in the generic set of Aboriginal cultural values in WSPs. The Basin Plan does not require WRPs to have regard to Indigenous peoples’ economic values and uses, or Indigenous peoples’ views about economic objectives or strategies for achieving them. However, this omission contradicts the object of NSW’s Water Management Act<sup>75</sup> and the broad Aboriginal cultural objective of each WSP which *does* include economic values and uses.

**(iii) Advancing the status quo is a voluntary option for the future**

NSW’s WRPs consistently defer any steps that would substantially strengthen protections or significantly improve Indigenous access to and control of water. The following statement in the NSW MDB Fractured Rock WRP is typical of all plans we viewed:

The consultation undertaken as part of the development of the WRPs is the first step in an ongoing process that will work with traditional owners and Aboriginal people and organisations to achieve the following outcomes around Indigenous water objectives:

- enhance cultural flows, economic opportunities, and access to water entitlements
- seek shared benefits by using water allocated for environmental and consumptive purposes to deliver cultural benefits where synergies exist
- acknowledge water is critical to the health and wellbeing of communities
- enable access to Country

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<sup>75</sup> *Water Management Act 2000* (NSW) s 3(c)(iv).

- embed Aboriginal participation, partnerships and communication into water management and government decision-making.<sup>76</sup>

It is perhaps not surprising that the WRPs do not stretch current performance when the MDBA interprets clause 10.52(3) in the following terms:

As this section is voluntary, MDBA's assessment role is to note arrangements. In other words, if no arrangements are specified under this sub-section it would not be likely to impact on MDBA's recommendation to accredit or not accredit a WRP. The value of the section is in the scope to initiate consideration and collaboration about arrangements for water resource management that has potential to deliver further positive outcomes for Aboriginal people.<sup>77</sup>

There are other instances where NSW WRPs put off making assessments and improvements to the future, including in the sections titled Risk Assessments. Section 10.53(1)(f) requires that a WRP must have regard to the views of relevant Indigenous organisations with respect to the 'risks to Indigenous values and uses arising from the use and management of the water resources of a water resource plan area'.<sup>78</sup> However, the Risk Assessment of each WRP (Schedule D) shows that Indigenous people were not considered a distinct category of interest group for the purposes of the assessment, and instead, were included in a general category referred to as 'public benefit values'. Further, NSW did not assess risks associated with this category, instead it deferred this action: 'Future risk assessments will include an assessment of these risks as further data becomes available'.<sup>79</sup> Risk assessments in groundwater WRPs prescribe even less certainty, stating such future

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<sup>76</sup> *Murray–Darling Basin Fractured Rock Water Resource Plan 2019* (NSW) 55.

<sup>77</sup> *WRP Guidelines* (n 53) 6.

<sup>78</sup> *Basin Plan 2012* (Cth) ch 4 pt 2, ch 10 pt 9. Chapter 4, Part 2 together with Chapter 10, Part 9 also set out matters that must be considered in WRP risk and management strategies, including risks and impacts from insufficient water availability and quality to maintain Indigenous values.

<sup>79</sup> This phrasing appears in each surface water WRP Risk Assessment. See eg, Murray-Darling Basin Authority, *Risk assessment for the Intersecting Streams Surface Water Resource Plan Area (SW13)* (Risk Assessment, December 2019) 74.

risk assessments *could* include risks to First Nations.<sup>80</sup> Delaying assessment of risks to Indigenous values also delays devising and implementing mitigation strategies. This serves to prolong mitigation or restoration of the damage associated with historic and current water management practices.

**(iv) Fragmented approach to assessing Indigenous input**

Next, we highlight NSW's approach to addressing many of the Part 14 requirements by referring to material in separate First Nations' Consultation Reports. To address the Basin Plan requirement to identify First Nations' objectives and outcomes (10.52), every NSW WRP refers to a series of tables in Attachments to Schedule C (First Nations Consultation Reports) that list Aboriginal values and uses. These values and uses were formulated into objectives and outcomes also listed in the tables in these separate consultation reports. The WRPs also claim NSW had regard to the views of Indigenous peoples in relation to cultural flows (10.54) and risks to Indigenous values and uses (10.53(1)(f)) by presenting those views in these Consultation Reports. Contrary to MDBA's assessment guidelines, NSW WRPs offer no description of how properly considering these views has (or has not) influenced the content of the WRP.<sup>81</sup>

There are several problems with this approach to addressing requirements which ultimately raise questions about the degree to which decision-makers could genuinely have had regard for these matters in preparing the WRPs. First, it appears to have enabled NSW to prepare WRPs without comprehensively consulting all affected First Nations in a timely manner. Every WRP we reviewed was placed on public exhibition without completely consulting with the relevant First Nations. In the worst case, the draft Murrumbidgee Alluvium WRP was placed on public exhibition before consultation workshops with any affected First Nations had commenced.

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<sup>80</sup> This phrasing appears in each groundwater WRP Risk Assessment. See eg, Murray-Darling Basin Authority, *Risk Assessment for the Lachlan Alluvium Water Resource Plan Area (GW10)* (Risk Assessment, 2018) 95.

<sup>81</sup> *Water Resource Plans – Part 14 Guidelines* (n 53) 6-7.



This raises procedural questions about opportunities for Nations to review and comment on their consultation outputs *and* the influence that consultation outcomes had on the WRP more substantively.

Publicly available WRP assessments from MLDRIN reveal a range of consultation shortcomings that also apply across the southern NSW WRPs we assessed, and which compound concerns about the possible impact of First Nations' input on WRPs. Several WRPs submitted to the MDBA for review refer to a failure to complete consultation with various First Nations. For example, consultation with the Tati Tati and Weki Weki Nations was incomplete when Murray Alluvium and Fractured Rock Alluvium WRPs were submitted. Clearly, deferring engagement and consideration of the outcomes of such engagement until WRP preparations are complete makes it impossible to affect the course of action or decision-making in preparing those plans, as required by the Basin Plan. MLDRIN documented instances of inadequate resourcing leading to compressed timetables; limited scope and scale of discussions and engagement; insufficient opportunities for engagement activities on Country; and insufficient involvement of First Nations in drafting, reviewing, and approving written outputs from consultation. Several Nations reported not been engaged at all about groundwater values and uses.<sup>82</sup> In at least one case, the Lachlan Surface Water Resource Plan, the MDBA advised that a major reason for not accrediting that plan in late 2020 was 'systemic issues' relating to Indigenous consultation.<sup>83</sup>

The WRPs affecting Barkandji interests represent a particularly egregious example. All NSW WRPs that overlap with the Barkandji native title determination area were submitted *while the Barkandji consultation report remained incomplete*. In 2018, Hartwig, Jackson and Osborne were critical of the failure by NSW to account for the native title rights and interests of

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<sup>82</sup> Porous Rock Assessment Summary (n 64).

<sup>83</sup> Email communication from the MDBA cited by Cameron Gooley, 'Water talks latest in Aboriginal consultation bungles by NSW Government', *Sydney Morning Herald* (online, 19 September 2021) <<https://amp.smh.com.au/national/nsw/water-talks-latest-in-aboriginal-consultation-bungles-by-nsw-government-20210914-p58rho.html>>.

Barkandji in the development of WSPs in north-western NSW<sup>84</sup> and the issue was subject to further adverse comment by the NSW Natural Resources Commission in its review of the Barwon-Darling WSP (2012).<sup>85</sup> The claim was determined in 2015 yet the native title holders remain no better off. In July 2020, NSW gazetted changes to the WSP, including in relation to native title, the protection of environmental water held by the CEWH and resumption of flows,<sup>86</sup> but these fell well short of the amendments required to improve the health of the Darling River/Barka and deliver concrete water rights to the Barkandji. Although the plans we reviewed (see Barwon-Darling, Darling Alluvium, Lachlan Alluvium, MDB Fractured Rock) that overlap with Barkandji land include a requirement to satisfy native title rights, the volume of water take is not specified. The NSW MDB Fractured Rock WRP states, for example, that ‘the volume of water take may be identified through Indigenous Land Use Agreement (ILUA) negotiations with the recognised Native Title holders’.<sup>87</sup>

The reliance on referring to detached consultation reports that contain the substance of Indigenous input makes it more difficult for decision-makers and others to consider as they implement the WRP. Additionally, many of the consultation reports are not available to be viewed, which limits the capacity of Traditional Owners or the public to ensure compliance. It is acknowledged that NSW and the MDBA have withdrawn some reports from public access on the request of First Nations, we suggest however that a mechanism for protecting confidential information while maintaining transparency should have been agreed prior to commencement of the public notification period.

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<sup>84</sup> See generally Lena Hartwig, Sue Jackson and Natalie Osborne, ‘Recognition of Barkandji water rights in Australian settler-colonial water regimes’ (2018) 7(1) *Resources* 16.

<sup>85</sup> NSW Natural Resources Commission, *Review of the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012* (Final Report, September 2019) 5.

<sup>86</sup> *Water Sharing Plan for the Barwon-Darling* (n 71) cl 20, 42A, 50.

<sup>87</sup> *Water Sharing Plan for the NSW Murray Darling Basin Fractured Rock* (n 63) 108.

(v) **ESLT and Planned Environmental Water (PEW)**

While environmental and cultural water requirements are not one and the same,<sup>88</sup> First Nations advocates maintain that healthy Country depends on sustainable management practices and sufficient flows as a minimum. Therefore, the well-documented failure to limit extractions under the Basin Plan to an ESLT<sup>89</sup> will exacerbate water dispossession, including by degrading rivers (the entirety of which are spiritually significant)<sup>90</sup> and limiting watering of other culturally significant places not yet receiving environmental water. Of additional concern is the possibility that environmental water known as 'PEW', which is provided for in rules in WSPs, will not be adequately protected by NSW in its updated WSPs (which as noted above, sit within WRPs). Any such erosion would fall foul of the Water Act and Basin Plan, both of which prohibit any net reduction in the level of protection provided for PEW under state water laws in force immediately before the Basin Plan took effect (in late 2012).<sup>91</sup> Notwithstanding this prohibition, PEW rules in some updated draft WSPs have been changed,<sup>92</sup> giving rise to the possibility of a reduction in this form of environmental water. As NSW's WRPs (and the WSPs that sit within them) are yet to be finalised and accredited under the Water Act, it is difficult to draw any definitive conclusions as to whether these rule changes will be given the 'green light' by the MDBA and Minister. If they are, they will invariably add to the list of provisions that favour consumptive uses at the expense of First Nations responsibilities to Country.

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<sup>88</sup> Murray Lower Darling Rivers Indigenous Nations, Submission No 60 to Productivity Commission, *National Water Reform Public Inquiry* (2017) 10.

<sup>89</sup> See eg, *Royal Commission into the Murray-Darling Basin Plan* (Final Report, 29 January 2019); Emma Carmody, 'The Unwinding of Water Reform in the Murray-Darling Basin: A Cautionary Tale for Transboundary River Systems' in Cameron Holley and Darren Sinclair (eds), *Reforming Water Law and Governance* (Springer, 2018) 33.

<sup>90</sup> Tony McAvoy, 'Water – Fluid Perceptions' 2006 1(2) *Transforming Cultures eJournal* 97.

<sup>91</sup> *Water Act 2007* (Cth) s 21(5); *Basin Plan* (n 73) cl 10.28.

<sup>92</sup> *Draft Water Sharing Plan for the Upper Namoi Regulated River Water Sources 2020* (NSW); Commonwealth Environmental Water Holder, Submission to the Murray-Darling Basin Authority, *Draft Namoi Surface Water Resource Plan* (October 2019).

## V DISCUSSION AND CONCLUSION

From assessment of the available WRPs in the NSW portion of the MDB, we identified significant shortcomings in consultation procedures and found that the treatment of Indigenous interests was formulaic, tokenistic, and overwhelmingly descriptive. By way of contrast, rights for consumptive users—the majority of whom are irrigators—are legally defined, enforceable, and subject to compensation in certain circumstances.<sup>93</sup> This distinction reflects the neo-colonial nature of water law and policy and the failure to reverse over two centuries of dispossession. We accordingly see no possibility of any real increase in the level of protection for Indigenous rights and interests through WRPs under the minimum standard currently prescribed in law. This result is consistent with the Indigenous provisions of the Water Act which seek to merely improve consultation and not to redistribute water allocations and management control to First Nations.<sup>94</sup>

Other Basin jurisdictions demonstrate a more responsive and progressive approach to consultation and engagement and are taking modest steps towards recognising First Nations water rights, despite the confines of the Federal framework. For instance, Queensland's WRPs in the northern MDB commit to returning portions of unallocated groundwater to First Nations people which, following feedback received during Indigenous consultation and in line with the definition of cultural flows, will be able to be used for any purpose (including economic or commercial).<sup>95</sup> In parallel with its water resource planning, Victoria is working to implement its state water policies to better address Aboriginal values and uses, boost Indigenous participation in water management and decision-making, and develop a Roadmap for increasing Aboriginal water access.<sup>96</sup> Certainly, there are opportunities for

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<sup>93</sup> See eg, *Water Management Act 2000* (NSW) ch 3 pt 2 div 9.

<sup>94</sup> Godden, Jackson & O'Bryan (n 14); Tan & Jackson (n 11).

<sup>95</sup> Murray-Darling Basin Authority, *Aboriginal Peoples Water Needs in the Murray-Darling Basin* (Guide, February 2019) 76.

<sup>96</sup> See eg, Department of Environment, Land, Water and Planning (Victoria), *Victoria's North and Murray Water Resource Plan* (Plan, 2019) ch 8, 331

these actions and commitments to go further,<sup>97</sup> but against the backdrop of Australia's colonial water history and the current Federal water framework, these are important developments that provide pertinent examples for NSW to consider.

As NSW revises its WRP for resubmission to the MDBA, it will be imperative that it pays attention and responds appropriately to the critiques contained here and the feedback produced through MLDRIN and NBAN's assessments, as well as the MDB Royal Commission. It is acknowledged that some of the issues documented in this paper stem from the weaknesses of the Federal water framework for the Basin with respect to Indigenous water rights. However, in 2021, it is no longer acceptable for NSW to struggle to meet the woefully low ambitions of water law in the MDB. Indigenous consultation approaches must be appropriate and genuine, and decision makers must ensure local First Nations' interests and views are accommodated within, and impact upon, the substance of water planning instruments and processes.

Ultimately, water allocation planning should be a means of effecting change to the distribution of highly valuable water rights so that First Nations are no longer locked out of using water for commercial gain (or any other purpose).<sup>98</sup> Economic outcomes for First Nations remain an outstanding challenge for MDB jurisdictions, as acknowledged in the recent review of the Basin Plan by the MDBA. That assessment recommended that 'First Nations, Basin government and the MDBA should develop a critical pathway for the use of water for cultural and economic outcomes'.<sup>99</sup> As the 2026 review of the Basin Plan approaches, we implore federal policy makers to carefully review the severe limitations and injustices that the current Water Act, Basin Plan and WRP frameworks perpetuate. Action must entail early and informed engagement with First Nations and their peak bodies as well as a genuine willingness to transform law and policy. Australian governments can no longer tread water on this vital element of Indigenous rights.

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<sup>97</sup> Erin O'Donnell, Lee Godden and Katie O'Bryan, *Cultural Water for Cultural Economies* (Final Report, 2021) 49.

<sup>98</sup> Hartwig et al (n 10).

<sup>99</sup> Murray-Darling Basin Authority, *The 2020 Basin Plan Evaluation* (Report, 2020) 126.