



Submission to the New South Wales Natural Resources Commission review of the *Water Sharing Plan for the Murrumbidgee Regulated River Water Source 2016*

Introduction

Murray Lower Darling Rivers Indigenous Nations (MLDRIN) is a representative confederation of sovereign First Nations from across the Southern Murray Darling Basin. MLDRIN advocates for water justice for First Nations and works to empower our members to care for rivers, waterways, and river Country. More information about MLDRIN, its membership, and its functions can be found at www.mldr.in.org.au.

Our membership, of relevance to the Murrumbidgee River and catchment, includes the Barapa Barapa, Muthi Muthi, Nari Nari, Ngunnawal, Tati Tati, Wadi Wadi, Weki Weki, Wemba Wemba, Wiradjuri, and Wolgalu Nations. These are sovereign Nations who have never ceded their rights to their rivers and Country. The Murrumbidgee River holds deep cultural significance for these sovereign First Nations. This significance goes beyond the division of so-called 'regulated' and 'unregulated' or 'lower' and 'upper' segments, to use the state's language, because the river is revered as a powerful life force that flows from the mountains to the sea. This holistic perspective reveals the complex network of upstream and downstream obligations that the Nations who are connected to the Murrumbidgee bear responsibility for. Additionally, MLDRIN's experience working in the Murrumbidgee system and in partnership with Murrumbidgee Traditional Owners has shown us firsthand how the impacts and issues related to the Murrumbidgee River extend beyond the boundaries of regulated and unregulated areas.

In recognition of these principles and in honour of our member Nations, MLDRIN is compelled to provide a submission that reflects the realities occurring throughout the broader Murrumbidgee system beyond only the parts that are managed by the *Water Sharing Plan for the Murrumbidgee Regulated River Water Source 2016* (hereafter 'Murrumbidgee Regulated WSP'). Indeed, any review of any WSP for any part of the Murrumbidgee must consider the concerns and effects held by upstream *and* downstream Nations and the territories for which they hold ongoing cultural obligations to care for. The complex network of upstream and downstream obligations held by these Nations means that multiple Nations, including those that sit outside the boundaries of the Murrumbidgee Regulated WSP, have legitimate interests in this WSP. This is because their capacity to practice and perform their cultures in some cases is dependent on the health and management of other waterway sections, regardless of state-defined management boundaries.

MLDRIN is deeply committed to upholding the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and views it as both a guiding framework and a point of reference when holding state and federal governments accountable. Among numerous notable and relevant UNDRIP Articles, of particular significance is Article 19, which emphasises the importance of meaningful consultation and cooperation with Indigenous peoples, through their representative institutions, to obtain their free, prior, and informed consent before enacting legislative or administrative measures that may affect them.

UNDRIP and the principles of free, prior, and informed consent are intended to uphold First Nations peoples' inherent and unceded rights. Where genuinely considered and upheld by states, they can contribute to the survival, dignity, and well-being of First Nations people. MLDRIN explicitly foregrounds

these in this submission to emphasise their importance not only to us and our member Nations, but also for underpinning policies, regulations, and legislation. We implore the New South Wales (NSW) Natural Resources Commission (NRC) to reflect on the extent to which the NSW Government has acted in accordance with these in developing, amending, and implementing the Murrumbidgee Regulated WSP and opportunities to improve in this regard in the future.

While this submission considers the Murrumbidgee Regulated WSP in its entirety, at times it is necessary to distinguish between specific features of versions of the Murrumbidgee Regulated WSP that operated until 22 December 2022 (hereafter ‘Murrumbidgee Regulated WSP 2016-2022 versions’) and the current version gazetted 23 December 2022 (hereafter ‘Murrumbidgee Regulated WSP 2022 version’). Overall, MLDRIN is of the position that the Murrumbidgee Regulated WSP is not contributing to or advancing Murrumbidgee Traditional Owners’ objectives, as we justify through this submission.

This position and submission are informed by:

- Ongoing conversations with MLDRIN delegates, appointed by their Nations, with connections to, rights to, and interests in the Murrumbidgee River.
- Discussion and analysis as part of the MLDRIN-led assessment workshop with Traditional Owners¹ for the Murrumbidgee Surface Water (SW) Water Resource Plan (WRP), held in March 2023, to the extent that is relevant to the Murrumbidgee Regulated WSP. This is possible and appropriate because the NSW Government uses specific components of WSPs as ‘fundamental components’ in this WRP.² For the Murrumbidgee Surface Water WRP, this includes components of a version of the Murrumbidgee Regulated WSP that appears similar to the Murrumbidgee Regulated WSP 2022 version. MLDRIN has permission from workshop attendees to draw from these insights in this submission.³
- Analysis of the Murrumbidgee Regulated WSP (including the 2016-2022 versions and 2022 version), and our acquired knowledge and concerns of other inland NSW surface water WSPs and the Murrumbidgee catchment.

The issues presented in this submission are ordered thematically within the following topics:

- (1) First Nations consultation and input
- (2) The WSP’s Aboriginal cultural objectives
- (3) The WSP’s contributions to Aboriginal cultural objectives and outcomes
- (4) Other matters

Where appropriate, MLDRIN offers observations and recommendations about progressing and improving the Murrumbidgee Regulated WSP in relation to each of these topics. We preface this by reiterating that change to the Murrumbidgee Regulated WSP – and NSW WSPs more generally – must be subject to appropriate consultation with Traditional Owners with rights and interests in the waterway or plan area.

¹ This workshop informs MLDRIN’s advice to the Murray Darling Basin Authority (MDBA) about whether a WRP addresses the *Basin Plan 2012* requirements in cl 10.52-10.55. This function is provided by the legal note to Chapter 10 Part 14 of the *Basin Plan*. See Sue Jackson, Emma Carmody and Lana Hartwig, ‘Treading water on Indigenous water rights: The serious deficiencies of water allocation planning and management in NSW under the Murray Darling Basin Plan’ (2021) 27 *Pandora’s Box Law Journal* 72, 80.

² NSW Department of Planning and Environment (DPE), *Murrumbidgee Surface Water Resource Plan* (2022) 4 <<https://www.mdba.gov.au/sites/default/files/pubs/murrumbidgee-surface-water-resource-plan-%28sw9%29.pdf>>.

³ MLDRIN acknowledges that, at the time of writing, the 2022 version of the proposed Murrumbidgee SW WRP is still under assessment by the MDBA. Comments and observations arising from this workshop are still relevant here, though, because submission of a WRP implies that the NSW Government views it to be in an accreditable state.

At the outset, we note that many of the issues and concerns this submission raises are long-standing and of relevance to other NSW WSPs (and NSW water processes more broadly). MLDRIN has shared these issues with the NSW NRC over recent years, including through other WSP review submissions, interviews, and other conversations. Therefore, we direct the NSW NRC to consider the issues raised in the past to the extent that they are relevant to this WSP.

(1) First Nations consultation and input

MLDRIN understands that, like other WSPs, the Murrumbidgee Regulated WSP was originally developed without adequate First Nations consultation. For example, not all Nations with interests in the WSP were consulted. There are also instances of updates and changes to the WSP that occurred without consultation or input from Nations, as this submission further spells out. Such practices cannot be repeated moving forward; First Nations consultation to an appropriate standard is no longer considered ‘best practice’ but instead the bare minimum.

MLDRIN Nation delegates have deep concerns with water-related consultation in NSW beyond the Murrumbidgee Regulated WSP. Largely, these stem from NSW’s approach to WRP consultation in 2018 and 2019, and how it has subsequently used that information in its proposed WRPs (and other processes beyond those specified in signed Data Use Agreements).⁴ Frequent references by the NSW Department to its “co-design approach” to the Aboriginal Water Strategy in material about the NSW Water Strategy⁵ and its WRPs⁶ further aggravate these grievances. This is because no MLDRIN NSW Delegates are aware of any NSW Government led consultation, let alone engagement or partnerships with NSW Traditional Owners, about the design of the approach to developing the Aboriginal Water Strategy or any of its content. The apparent disregard by the NSW Department for these concerns, as experienced by Nations and MLDRIN to date, has further exacerbated this situation. Details about these concerns and grievances are published elsewhere⁷ and have been raised directly by MLDRIN with the new NSW Water Minister in recent months.

Traditional Owners’ concerns about other NSW water-related consultations are relevant to this WSP review for several reasons. Firstly, the NSW Department makes statements in the 2022 version of the proposed Murrumbidgee SW WRP about the impact of this past consultation⁸ and future consultation⁹ in

⁴ For example, the NSW Government is scoping the draft Aboriginal Water Strategy by drawing “on significant First Nations/Aboriginal engagements from 70 workshops conducted in recent years on water resource planning and regional water strategies.” See NSW DPE, *Report on the strategy’s progress: The report on the progress made from the 2021-22 Implementation plan* (September 2022) 22 <https://water.nsw.gov.au/__data/assets/pdf_file/0003/527043/nsw-water-strategy-annual-progress-report-on-implementation.pdf>. This use of materials is beyond the scope of signed NSW WRP Data Use Agreements.

⁵ See, for example, NSW DPE, *NSW Water Strategy Implementation Plan – 2022 to 2024* (September 2022) 15 <https://water.dpie.nsw.gov.au/__data/assets/pdf_file/0007/527038/nsw-water-strategy-implementation-plan-2022-24.pdf>.

⁶ NSW DPE (n 2) 20.

⁷ For more detailed commentary about the NSW Government’s WRP First Nations consultation, please see assessments published online by the MDBA associated with accredited WRPs. See MDBA, ‘State Water Resource Plans’ (Web Page, June 2023) <<https://www.mdba.gov.au/basin-plan/water-resource-plans/state-water-resource-plans>>. Although MLDRIN’s advice about the Murrumbidgee SW WRP is not yet published (this WRP is not yet accredited), many of the concerns recorded and associated with other NSW WRPs that have been (i.e., MDB Fractured Rock and MDB Porous Rock WRPs) are relevant here.

⁸ For example: “[First Nations WRP] consultation identified the objectives and outcomes listed in the Attachments to Schedule C. Those objectives and outcomes will inform future updates to the provisions relevant to Aboriginal people in relation to water management in the Murrumbidgee WRPA as set out in Part 2 of ... the *Water Sharing Plan for the Murrumbidgee Regulated River Water Source 2016*.” NSW DPE (n 2) 9-10.

⁹ For example: “Water sharing plans can be replaced at the end of their ten-year term. As part of future

direct relation to future WSPs (which include the Murrumbidgee Regulated WSP). Secondly, both the NSW NRC and the NSW Department will be engaging with Traditional Owners for the purposes of this review and replacing the WSP (respectively) in this context of distrust and trauma resulting from this past consultation. Both must be aware of and sensitive to the hurt and impact of this to avoid reinforcing the trauma and making the situation even worse.

The NSW NRC and NSW Government must be intentional about not repeating the mistakes of the past. Examples of more appropriate consultation that the NSW NRC and NSW Government should adopt include:

- Ensuring that Nations can shape the consultation approach.
- Ensuring that all efforts are made to engage with *all* relevant Traditional Owners for the Murrumbidgee River.
- Ensuring Traditional Owners are fairly resourced to travel to and participate in consultation opportunities.
- Offering opportunities for Traditional Owners to meet and be consulted as individual Nations, as well as collective opportunities, so that those upstream and downstream can have their concerns heard together.
- Ensuring the scope and purpose of the consultation are clearly and repeatedly communicated, and that participants are equipped with suitable information about the process and/or options for consultation (in other words, ensuring the principles of free, prior, and informed consent are practised).
- Not using information collected from Traditional Owners in past water-related consultation exercises for purposes that have not been agreed or consented to by participants.
- Investing in on Country consultation activities, which will be more beneficial for the WSP *and* the Traditional Owner participants than standard consultation approaches that are not a cultural match for Traditional Owners. One specific example could be supporting a large road trip starting at the top of the Murrumbidgee, where Departmental staff hear continuous stories about the devastation of Country from one Nation to the next.
- Investing in direct and ongoing relationships between the Department and First Nations communities and not relying on consultants that are culturally inappropriate and/or lack appropriate water management expertise.

(2) The WSP's Aboriginal cultural objectives

Like other NSW WSPs, the Murrumbidgee Regulated WSP includes limited mechanisms and clauses that explicitly address or appear to help advance First Nations objectives. One of the most substantial parts (by length) that does, though, is the objectives, strategies, and performance indicator clauses (cl 10 of the 2022 version; cl 11 of the 2016-2022 versions). Even though these non-substantive components of the WSP “do not give rise to any binding obligations in-and-of-themselves”,¹⁰ they are still important largely because there are limited other provisions. We make several observations here.

In the 2016-2022 versions of the Murrumbidgee Regulated WSP, some elements within the ‘social and cultural’ objectives, strategies, and performance indicators had some relevance to First Nations people (cl 11). It is only the Murrumbidgee Regulated WSP (2022 version) that first included specific Aboriginal cultural objectives, strategies, and performance indicators (cl 10). It is surprising and disappointing that it has taken until the end of 2022 for the WSP to more seriously consider and platform First Nations

plan replacements, consultation will build on learnings and relationships developed with First Nations to ensure that social, cultural, spiritual and customary objectives and strategies are considered.” NSW DPE (n 2) 20.

¹⁰ Jackson et al (n 1) 86.

objectives in this way. Indeed, some MLDRIN Nation representatives have commented that it seems “convenient” that the NSW Government did not update the WSP in this way until so recently.

This was a perfect opportunity to partner, or at the very least engage, with local Murrumbidgee Traditional Owners to ensure the new objectives met their priorities and needs. Instead, the new specific ‘Aboriginal cultural’ objectives, strategies, and performance indicators clauses are nearly identical to those that appear in all other regulated WSPs in inland NSW. Significantly, the NSW Government did engage with Murrumbidgee Traditional Owners for the purposes of NSW’s WSPs in 2018 and 2019, and many Nations expected this material would influence the relevant WSPs. With proper and transparent communication from the NSW Government, this could have been consistent with the Data Use Agreements signed by Traditional Owners who participated in this engagement given the interconnected nature of NSW’s WSPs and WSPs. However, the NSW Government did not take up this opportunity.

It is worth noting that the 2020 version of the proposed Murrumbidgee SW WRP made the erroneous claim that outcomes from this First Nations consultation informed these more extensive Aboriginal cultural objectives provisions as set out in Part 2 of the draft WSP attached to that WRP¹¹ (and which are similar to those in the Murrumbidgee Regulated WSP 2022 version). This statement was false, however, and has been corrected in the 2022 version of the proposed WRP to now state that the WRP consultation will inform future updates to these WSP provisions.¹²

MLDRIN acknowledges that the Murrumbidgee Regulated WSP 2022 version’s Aboriginal cultural WSP objectives are more targeted or specific than those that appeared in the 2016-2022 versions. Nonetheless, Nation representatives have observed issues with these newer and more targeted objectives, many of which create gaps for NSW’s accountability and ability to progress Nations’ objectives.

First, and fundamentally, the targeted objectives lack relevance and significance to local Murrumbidgee Traditional Owners. This is unsurprising given that the objectives were added without consideration of Murrumbidgee Traditional Owners’ priorities, needs, and objectives. The lack of specificity of these objectives for Murrumbidgee Traditional Owners has implications for advancing their actual objectives and outcomes (in contrast to those identified in the WSP). As just one example, the first of the four targeted objectives relates to providing access to water in the exercise of native title rights.¹³ While this might be important in the future, it was described by Nations as having little relevance at this time for the Murrumbidgee regulated system, especially as there are no current native title claims (let alone determinations) intersecting the Murrumbidgee River.

Second, there is a disconnect between the Murrumbidgee Regulated WSP 2022 version’s broad Aboriginal cultural objective and the targeted objectives that follow. That is, the “*broad* Aboriginal cultural objective ... is to maintain, and where possible improve, the spiritual, social, customary and economic values and uses of water by Aboriginal people”.¹⁴ However, the “*targeted*” objectives are narrow and reductive and do not clearly support the entire “*broad*” objective. In particular, there is no target objective that relates to economic values and uses. This is significant because the WSP states that

¹¹ NSW Department of Planning, Industry and Environment (DPIE), *Murrumbidgee Surface Water Resource Plan* (2020) 6.

¹² NSW DPE (n 2) 9-10. MLDRIN cautions, though, that the NSW Government must avoid using information collected from Traditional Owners in past water-related consultation exercises for purposes that it does not have the express consent and permission from participants to use.

¹³ Murrumbidgee Regulated WSP 2022 version, cl 10(2)(a).

¹⁴ *Ibid* cl 10(1).

the success of strategies for achieving the broad Aboriginal cultural objective will be measured based on the success of the targeted objectives.¹⁵

This disconnect is made further significant by the fact that the targeted objectives also do not align with other NSW water management instruments. For example, they are inconsistent with the object of the overarching enacting legislation, “to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water, including benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water”.¹⁶ The Murrumbidgee Regulated WSP 2022 version’s objectives (and the lack of connection to economic values and uses) are also inconsistent with Priority 2 of the NSW Water Strategy, which is to “recognise First Nations/Aboriginal People’s rights and values and increase access to and ownership of water for cultural and economic purposes”.¹⁷ This strategy was released in August 2021 and, therefore, prior to the addition of these objectives to the WSP.

Third, while more targeted than previous versions of the WSP, some of the Aboriginal cultural objectives are unclear and/or not well defined, which adds to the challenges of measuring progress and ‘success’. For example, one targeted objective is “to contribute to the maintenance of water quality within target ranges to ensure suitability of water for Aboriginal cultural uses”.¹⁸ However, no target ranges are provided in the 2022 version of the WSP nor are any other established ranges referred to, such as in the legal notes. Without these being defined, it is not possible to measure compliance or progress towards this targeted objective or, therefore, the broad objective.

From considering the strategies and performance indicators associated with the Aboriginal cultural objectives, on balance, some can be construed as slight improvements compared to previous iterations of the WSP. These improvements largely stem from the structure of the WSP and there now being specific strategies and performance indicators dedicated to Aboriginal cultural objectives that did not exist previously, rather than the WSP’s actual substance.

That is, while the inclusion of specific ‘strategy’ clauses in the WSP is new, the legal ‘notes’ associated with each one line up with WSP provisions that existed previously. As just one example, one strategy is to “provide for water associated with Aboriginal cultural values and uses”,¹⁹ which as an aside, is incredibly vague. The legal note attached to this strategy clause states: “The provisions in Part 7 provide opportunities for Aboriginal people to access water by allowing for the granting of an access licence of the subcategory ‘Aboriginal cultural’”.²⁰ These specific purpose access licences with a subcategory of ‘Aboriginal cultural’ have, however, existed since the original *Water Sharing Plan for the Murrumbidgee Regulated River Water Source 2003* and, as will be set out later in this submission, are in fact weaker under the 2022 version.²¹ Substantively, then, this does not constitute any real change. Other key strategies that would actually progress First Nations water access are needed, like access to land,

¹⁵ Ibid cl 10(4).

¹⁶ *Water Management Act 2000* (NSW), s 3(c)(iv).

¹⁷ NSW DPIE, *NSW Water Strategy* (August 2021) <https://water.nsw.gov.au/__data/assets/pdf_file/0007/409957/nsw-water-strategy.pdf> 56.

¹⁸ Murrumbidgee Regulated WSP 2022 version, cl 10(2)(d).

¹⁹ Ibid cl (3)(b).

²⁰ Ibid legal note to cl (3)(b).

²¹ As a tangential, but important note, MLDRIN is of the view that this change renders the WRP noncompliant with Basin Plan requirement 10.55. That is, this change means that the capacity for this provision to maintain the same level of protection of Indigenous values and uses compared to the transitional WRP is undeniably weakened.

infrastructure, and resources to support water access and use.²² The inclusion of specific performance indicators in the 2016 version of the WSP is an important addition too, but not all are necessarily amenable to measurement and/or are actually all that specific to First Nations' objectives.²³

An important element of setting objectives in the Murrumbidgee Regulated WSP (and other plans, policies, programs, and instruments), is monitoring, measuring, and reporting their progress. The NSW Government's failure to prioritise this step has come under scrutiny in recent years, as have the findings from audits that have been completed.²⁴ As the Aboriginal cultural objectives that appear in cl 10 of the Murrumbidgee Regulated WSP 2022 version have only been in effect for six months, it is unlikely that the NSW NRC's recent audit of the Murrumbidgee Regulated WSP will report on the NSW Government's performance against these new (limited) measures (but should do so for those that were in cl 11 of the Murrumbidgee Regulated WSP 2016-2022 versions). We expect that this will see the NSW Government again avoid being held to account for its inadequate actions to support First Nations objectives and non-compliance with the WSP.

The 2022 version of the proposed Murrumbidgee SW WRP refers to "work to establish a monitoring, evaluation and reporting framework for water sharing plans".²⁵ MLDRIN delegates and MLDRIN have not received or located any further information about this framework. We stress that Traditional Owners must contribute to and shape this framework *and* be empowered to play a role in monitoring and evaluating all WSPs. Such essential contributions and work to help hold the NSW Government to account must be resourced appropriately.

Finally, and as touched on, the objectives are non-substantive and do not bind the state to act. As Jackson et al (2021) explain, "the material effect of NSW's efforts to protect or advance Indigenous interests in water ... therefore depend[s] on how Indigenous interests are treated in the substantive sections of WSPs".²⁶ As long as these objectives and strategies are not underpinned by strong, implementable, and tangible mechanisms, they will effectively serve as lip service. Instead, objectives need to be underpinned by, and arguably must drive and inform, substantive provisions in legislation, regulations, policy, and programs. This is not observed in the Murrumbidgee Regulated WSP.

MLDRIN offers the following overarching observations and recommendations:

- The objectives, strategies, and performance indicators of the Murrumbidgee Regulated WSP 2016-2022 versions and 2022 version were not informed by input from Murrumbidgee Traditional Owners, despite opportunities (and expectations) to do so.

²² See, eg, Bradley J Moggridge, Lyndal Betteridge and Ross M Thompson, 'Integrating Aboriginal cultural values into water planning: a case study from New South Wales, Australia' (2019) 26(3) *Australasian Journal of Environmental Management* 273; Erin O'Donnell, Lee Godden and Katie O'Bryan, 'Cultural Water for Cultural Economies: Final report for the Accessing water to meet Aboriginal economic development needs project' (University of Melbourne, 2021) <https://law.unimelb.edu.au/__data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf>; Lana D Hartwig et al, 'Water trading by Aboriginal organisations in NSW, Australia' (2023) 100 *Journal of Rural Studies* Article 102997.

²³ We acknowledge that other WSP objectives may be relevant to First Nations people and priorities (such as but not limited to some environmental objectives, cl 8), but this cannot be assumed.

²⁴ Kylar Loussikian, 'NSW water-sharing plans in disarray', *The Sydney Morning Herald* (online, 4 October 2019) <<https://www.smh.com.au/politics/nsw/nsw-water-sharing-plans-in-disarray-20191003-p52xdo.html>>; Kylar Loussikian, 'Damning, disappointing': Debacle in state's water sharing plans', *The Sydney Morning Herald* (online, 18 February 2020) <<https://www.smh.com.au/politics/nsw/damning-disappointing-debacle-in-state-s-water-sharing-plans-20200218-p541xg.html>>.

²⁵ NSW DPE (n 2) 20.

²⁶ Jackson et al (n 1) 86.

- Accordingly, the First Nations-related material in the Murrumbidgee Regulated WSP – particularly the Aboriginal cultural objectives, strategies, and performance indicators – is not specific to the Traditional Owners and conditions of the Murrumbidgee system.
- As far as MLDRIN can see, challenges persist for transparent monitoring, evaluation, auditing, and reporting about the Murrumbidgee Regulated WSP. The longer these issues persist, the longer the NSW Government’s failure to advance Aboriginal objectives will fly under the radar, further delaying urgent action and intervention.
- Nations must have a resourced role in monitoring, evaluating, and reporting on the Murrumbidgee Regulated WSP.
- Objectives need to be underpinned by, and arguably must drive and inform, substantive provisions in legislation, regulations, policy, and programs.

(3) Regulated river (high security) (Aboriginal cultural) access licence provisions

Specific purpose access licences (under Murrumbidgee Regulated WSPs 2016-2022 versions)

One of the few substantive provisions within the Murrumbidgee Regulated WSP 2016-2022 versions, was the Aboriginal cultural specific purpose water access licence provision (hereafter ‘Cultural Access Licences’ or ‘CALs’). However, as this section sets out, this substantive provision is limited in its ability to advance First Nations’ water objectives in the Murrumbidgee system. Some of the reasons for this are related to the CAL provisions generally (i.e., at a state-wide level), while others are linked to the Murrumbidgee system more specifically. We consider both in turn.

Multiple sources, including materials from the NSW NRC,²⁷ have highlighted the damaging obstacles that undermine the effectiveness of CAL provisions throughout NSW and hinder the ability for First Nations people to achieve self-determined outcomes as a result.²⁸ While intended to support Aboriginal objectives and outcomes stemming from water access, the NSW NRC has found, for example, that these unique water access entitlements are instead “restrictive, inequitable, and unable to be easily accessed and applied for”.²⁹ This is demonstrated by the fact that across NSW “only seven cultural water entitlements have ever been issued, with only two remaining in use” as of mid-2021.³⁰

Issues and challenges associated with CALs include the restricted allowable share volume, water use charges, the requirement for access to land in order to apply for and utilise the water, and difficulties in completing the application process.³¹ Additionally, their uses are restricted to state-defined determinations of ‘traditional’ or ‘cultural’ purposes that prohibit commercial uses and water trade. This is not only a form of structural discrimination and racism (in that these rules and conditions do not apply to other water users), but it also does not accommodate for Aboriginal self-determination, and problematically reinforces false perceptions that Aboriginal water interests are only subsistence-based and can be satisfied with small water volumes.³² MLDRIN delegates are also concerned that the very

²⁷ NSW NRC, *Final report: Review of the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012* (Document No. D19/4123, September 2019); NSW NRC, *Final report Review of the Intersecting Streams and Lower Murray-Darling unregulated water sharing plans* (Document No. D21/3099, March 2022).

²⁸ See Moggridge et al (n 22); Sue Jackson and Marcia Langton, ‘Trends in the recognition of Indigenous water needs in Australian water reform: the limitations of ‘cultural’ entitlements in achieving water equity’ (2011) 22(2-3) *Journal of Water Law* 109; Lee Godden, Sue Jackson and Katie O’Byrne, ‘Indigenous water rights and water law reforms in Australia’ (2020) *Environmental and Planning Law Journal* 37(6) 655.

²⁹ NSW NRC (2022) (n 27) 83.

³⁰ NSW DPIE (n 17) 57.

³¹ Moggridge et al (n 22).

³² Godden et al (n 28); Jackson and Langton (n 28).

small licence limits (in most water systems, 10ML/year per CAL) centre individuals, rather than a more holistic or collective approach that, in many circumstances, is more appropriate for First Nations' water access and ownership.

These are not the only obstacles to First Nations people benefiting from water access via these CAL provisions. Even if an Aboriginal person or organisation secures a CAL, it is still difficult to use or benefit from that water due to parallel issues including (but not limited to) ongoing land access; costs of, and access to, operational and suitable infrastructure; and, access to expertise and other capital.³³ It is disappointing that these issues remain unaddressed in the Murrumbidgee and across NSW, even though they have been known for many years.³⁴

Unique circumstances in the Murrumbidgee Regulated system also impact the utility and benefit that CALs can offer. One positive feature is that the Murrumbidgee Regulated WSP allowed for individual CAL applications to be up to 2150ML/year (until December 2022 – see later in this submission), which is a much greater volumetric limit than the very small 10ML/year limit elsewhere in NSW. This feature is likely to be one of the reasons that the CAL provision in the Murrumbidgee Regulated WSP has been accessed more than any other in the state.

Other local circumstances work to limit the effectiveness of these entitlements in advancing Murrumbidgee Traditional Owners' objectives and outcomes. Currently, there is one 2150ML/year CAL on issue in the Murrumbidgee Regulated system, held by the Riverina Local Land Services (LLS). While the Riverina LLS takes advice from its Aboriginal Cultural Advisory Committee about this CAL,³⁵ it is not an Aboriginal entity. As long as the entitlement sits with the LLS, First Nations do not have *direct* control and decision-making power over it. Such attributes can only come when the water is transferred or issued to direct First Nations ownership (or an entity nominated by Murrumbidgee Traditional Owners). This change in ownership and governance would be consistent with working towards better arrangements and outcomes for the next generation, which is an important priority for Murrumbidgee Traditional Owners. This would also be consistent with the NSW Water Strategy, statements in the 2022 version of the proposed Murrumbidgee SW WRP that the NSW Government supports increased Aboriginal water ownership,³⁶ and the addition of increasing First Nations' ownership of, legal interests over, and access to inland waters in the National Agreement on Closing the Gap.³⁷ Recent amendments to the WSP complicate this possibility, as discussed below.

Rules and regulations also affect the usability of the Murrumbidgee Regulated CAL and, in turn, constrain its potential to benefit Traditional Owners and Country. For instance, the current CAL cannot be used in some areas of the lower Murrumbidgee that Traditional Owners want to see watered, including Yanco

³³ Indeed, these challenges are applicable for Aboriginal people and organisations to use and benefit from water access entitlements more broadly, not just these specific purpose access licenses. See Jackson and Langton (n 28); O'Donnell et al (n 22); Hartwig et al (n 22).

³⁴ See Jackson and Langton (n 28).

³⁵ Riverina LLS, 'Riverina Aboriginal Cultural Water Allocation - Opportunity to Register Interest to Access' (Web Page, 2022) <<https://www.lls.nsw.gov.au/regions/riverina/grants-and-funding2/riverina-aboriginal-cultural-water-allocation-opportunity-to-register-interest-to-access>>.

³⁶ Eg "It is a priority to recognise cultural values in water management, as well as Aboriginal rights and values and increase access to and ownership of water for cultural and economic purposes." NSW DPE (n 2) 20.

³⁷ While a national inland waters target is under negotiation at the time of writing, the NSW Government's Closing the Gap Implementation Plan includes actions to address this focus. NSW Government, *2022–2024 NSW Implementation Plan for Closing the Gap* (August 2020) 116-119 <[https://www.aboriginalaffairs.nsw.gov.au/media/website_pages/closingthegap/nsw-implementation-plan/2022-24-implementation-plan/NSW-Closing-the-Gap-Implementation-Plan-2022-2024-\(4\)-accessible-Updated-\(1\).pdf](https://www.aboriginalaffairs.nsw.gov.au/media/website_pages/closingthegap/nsw-implementation-plan/2022-24-implementation-plan/NSW-Closing-the-Gap-Implementation-Plan-2022-2024-(4)-accessible-Updated-(1).pdf)>.

Creek and Gayini Nimmie Caira. We understand that these rules and conditions have blocked several collaborations between Nations and environmental water agencies seeking to use the CAL, such as to piggyback off environmental flows to these areas to generate greater environmental *and* cultural outcomes. We also question whether the Murrumbidgee Regulated WSP is interconnected enough with the Murrumbidgee Unregulated WSP to allow this water to be accessed *and* protected across the whole Murrumbidgee system, should that be desired by Nations. In short, current water management arrangements are problematically prohibiting First Nations from delivering water to their own Country in a manner that reflects their cultural responsibilities.

MLDRIN understands that NSW DPE engaged Alluvium Consulting to review the operation, use, and governance of the CAL in the Murrumbidgee Regulated system. MLDRIN was not consulted as part of this review and only has access to one of the four produced reports. Regardless, we are generally supportive of the findings in the *Recommendations for Improving Use of the Cultural Access Licences*³⁸ in addition to those we have set out here. In particular, we are supportive of the recommendations that would enable expanded and more flexible uses of the CAL, including for economic, commercial, and/or trade purposes. These are important priorities for Murrumbidgee MLDRIN Delegates, who have long advocated for these constraints on the CAL to be lifted to support Aboriginal self-determination.

MLDRIN offers the following overarching observations and recommendations:

- CALs are not a fit-for-purpose water access mechanism; challenges and obstacles to First Nations people accessing, using, and benefiting from CALs must be urgently addressed.
- Unique issues in the Murrumbidgee Regulated WSP context affect the utility and benefit of the CAL to Traditional Owners and Country. These include the current holding and governance arrangements, and system specific rules that prevent Nations from watering (and therefore caring for) their Country.
- The NSW Department has known about these challenges for a long time, but very limited changes have been made or project support offered. Given the comparative greater uptake of CALs through the Murrumbidgee Regulated WSP, it is an excellent case study to start trying out and testing some measures to address these challenges.
- NSW NRC has long been documenting these issues and offering recommendations for change. MLDRIN would welcome legislative changes that (a) make the NSW NRC's recommendations more binding and (b) empower the NSW NRC to hold the NSW Government to account.

Specific purpose access licences (under Murrumbidgee Regulated WSPs 2022 version)

The Murrumbidgee Regulated WSP 2022 version includes changes to the CAL provision. In short, the amended WSP introduced a 10ML/year share component limit on applying for and the granting of any new CALs.³⁹ In the previous version of the WSP,⁴⁰ and in fact since the original Murrumbidgee Regulated WSP,⁴¹ this limit was 2150ML/year (as detailed above). This greater allowable CAL volume has been advantageous and possibly contributed its comparatively greater uptake in the Murrumbidgee Regulated WSP compared with other NSW WSPs (applied for and used previously by the Nari Nari Tribal Council⁴² and currently by the Riverina LLS⁴³).

³⁸ Alluvium Consulting Australia Pty Ltd, *Recommendations for improving use of Cultural Access Licences* (30 June 2022).

³⁹ Murrumbidgee Regulated WSP 2022 version, cl 45(2).

⁴⁰ Murrumbidgee Regulated WSP 2016-2022 versions, cl 67(3).

⁴¹ *Water Sharing Plan for the Murrumbidgee Regulated River Water Source 2003*, cl 30(3)(c).

⁴² Jackson and Langton (n 28).

⁴³ Riverina LLS (n 35).

Here we highlight two key issues. First, we focus on procedural unfairness and the complete lack of consultation about this change. Second, we turn to the substantive impact of the change for the WSP to advance Aboriginal cultural objectives and outcomes.

MLDRIN first became aware of the NSW Government's intention to change this rule when assessing the 2020 version of the draft Murrumbidgee SW WRP,⁴⁴ which included a proposed replacement 2020 version of the Murrumbidgee Regulated WSP. With no explanation for the change offered in that WRP, MLDRIN sought clarity directly from the NSW Government. After several email follow up attempts in December 2020, January 2021, March 2021, June 2021, MLDRIN was finally informally provided with limited details about the proposed change in July 2021. Specifically, we were advised that the additional 10ML/year CAL limit rule was being introduced as it "is consistent across inland [Water Sharing] plans", and that this proposed change was not negotiable.⁴⁵ While the Federal Water Minister did not accredit this version of the WRP and the NSW Government did not adopt the 2020 replacement WSP, this new 10ML/year CAL limit was still included in the Murrumbidgee Regulated WSP via amendments gazetted in December 2022.⁴⁶

MLDRIN is unaware of any public or targeted consultations about this rule change. For instance, DPE's website states that "consultation on proposed [WSP] amendments is on the public exhibition page",⁴⁷ but archived versions of this public exhibition page since 2019 do not include any consultation associated with the Murrumbidgee Regulated WSP.⁴⁸ The NSW Department did not consult MLDRIN about the change as part of any formal amendment process (despite being aware of our concerns as raised via correspondence in 2021, as noted above). Nation representatives reported during MLDRIN's December 2020 and March 2023 Murrumbidgee SW WRP assessment workshops (and also since then) that they were not made aware of the rule change either. This includes representatives from the Nari Nari Nation who have secured water through CALs in the past and look to do so again in the future. Finally, environmental watering staff at partner agencies were also unaware of the rule change until conversations with MLDRIN in June 2023.

At an even more basic level, MLDRIN is unaware of any transparent reporting or notification about the added rule in any NSW-produced materials prior to the formal gazettal of the Murrumbidgee Regulated WSP 2022 version. This lack of consultation violates the NSW Department's own statement about WSP consultation, not to mention the foundational principles of procedural justice.

Justification for the change seems to be absent from relevant enabling legal instruments too. For instance, the *Water Management Act 2000* (NSW) states that the Minister may amend water management plans, which includes WSPs, for limited reasons only.⁴⁹ Additional allowable reasons were contained in the version of the Murrumbidgee Regulated WSP that was subject to amendment in

⁴⁴ See n 1.

⁴⁵ Email from NSW Water Planner to MLDRIN Project Officer, 13 July 2021.

⁴⁶ A similar version of the 2016 version of the WSP, including the new 10ML/year limit, appears in Schedule A of the 2022 version of the Murrumbidgee surface water WRP submitted to the MDBA for accreditation in January 2023. <<https://www.mdba.gov.au/publications/mdba-reports/murrumbidgee-water-resource-plan>>.

⁴⁷ NSW Government, 'Water Sharing Plan Status' (Web Page, 2023) <<https://www.industry.nsw.gov.au/water/plans-programs/water-sharing-plans/status>>.

⁴⁸ NSW Government, 'Public exhibition and public comment sought' (Web Page, 2023) <<https://www.industry.nsw.gov.au/water/plans-programs/water-sharing-plans/recently-on-public-exhibition>> with archives available since 2019 searched via <<https://archive.org/web/>>.

⁴⁹ *Water Management Act 2000* (NSW), s 45(1). The effect of the WSP change is also inconsistent with the objective of this Act (s 3(c)(iv)).

December 2022.⁵⁰ Neither legal instrument lists ‘consistency with other inland WSPs’, or anything to this effect, as a reason for amendment. Moreover, the Murrumbidgee Regulated WSP 2022 version remains inconsistent with other inland WSPs because it is the only one with an upper volumetric limit on all issued CALs (of 2150ML/year). Also of note, these inconsistencies date back nearly 20 years, so the timing of this change without adequate justification – especially without consultation of any kind – is dismaying.

These unacceptable and unjustified procedural matters alone should be reason enough for this rule change to be reversed immediately. The substantive and practical implications of this new rule only add further justification. MLDRIN is of the view that this new limit is a significant shift from the previous arrangements and reduces the potential effectiveness and possible benefits that are unique to the Murrumbidgee Regulated WSP (notwithstanding the above Murrumbidgee-specific limits). In fact, we would go as far as to say that this constitutes a form of modern-day water dispossession.

Without fair consultation or any transparent reporting about this new rule, including any benefits or costs, the following is offered based on MLDRIN’s direct dialogue with the overseeing NSW water planner (which took 6 months of following up on our behalf to gain access to).

First, the new 10ML/year limit on CAL applications does not affect the 2150ML/year CAL currently held by the Riverina LLS because it has already been issued. As long as the Riverina LLS continues to hold this 2150ML/year CAL, the new 10ML/year limit has no effect on that allocated volume of water. However, if, during the life of the WSP, this CAL was surrendered or cancelled for any reason and an Aboriginal individual or organisation sought to hold that water, the new clause would limit the volume of any new individual CALs to 10ML/year, up to a total available pool of 2150ML/year.⁵¹ In other words, as long as the status quo is maintained, First Nations will not be impacted by the rule change.

Such a perspective is, however, short sighted and does not reflect or accommodate Murrumbidgee Traditional Owners’ preferences for this water, for the immediate future or future generations. As established, Murrumbidgee Nation representatives have made it clear that the current CAL ownership and governance arrangements are not desirable. Instead, the CAL needs to be transferred or re-issued to a First Nations organisation (or First Nations nominated organisation) to better accommodate First Nations’ decision-making authority and rights to self-determination. Pursuing these long-held preferences is now even more difficult due to this short sighted rule change.

Also, practically, this rule means that if, in the future, an Aboriginal organisation wanted to access the full 2150ML/year, 215 separate CAL applications and entitlements would be required, whereas only one was previously necessary. This is an unnecessary and burdensome administrative load for no different outcome or benefit. Though, it is much more than just an administrative burden. It is an injustice that First Nations people must apply for rights to use, access, and benefit from water that they never ceded in the first place (especially with constrained uses and rules like CALs). So, every water entitlement application that First Nations people prepare is a reminder of and reinforces the trauma of dispossession, and has the potential to compromise their sovereignty. Additionally, MLDRIN queries whether WaterNSW is resourced to handle an influx of 215 CAL applications (for example), when previously this could be handled with one application.

⁵⁰ Murrumbidgee Regulated WSP 2016-2022 versions, Pt 12.

⁵¹ Email from NSW Water Planner to MLDRIN Project Officer, 13 July 2021.

Second, the WSP stipulates a total 2150ML/year limit for all CALs. Once 2150ML/year of water has been issued under entitlements (as is currently the case), no more can be issued in the Murrumbidgee Regulated system. This cap does not exist in any other WSP in NSW. If the justification for introducing the 10ML/year limit was for consistency with other inland WSPs, then following the same logic, this 2150ML/year overall cap must also be removed.

Alluvium Consulting's *Recommendations for Improving Use of the Cultural Access Licences* was released in June 2022.⁵² This report did not include any suggestions about reducing CAL volumes; in fact, the 10ML/year limit arguably goes against and is inconsistent with its recommendations including about changing the current governance arrangements and expanding the use conditions. At the same time, it is notable that none of Alluvium Consulting's recommendations were adopted or given effect in the December 2022 amendments. If the 10ML/year limit was planned by NSW as early as mid-2020 (based on the draft WSP version included in the 2020 version of the proposed Murrumbidgee SW WRP), we ask why this was not included and considered in Alluvium Consulting's review.

While on the surface this might seem like just a small and incremental change, the reality is that it makes the opportunities for Traditional Owners to benefit from CALs, an already constrained water access option, even more constrained. It further defies belief given that the timing of the rule change came after Alluvium Consulting's review was completed *and* NSW's policy positions around increasing Aboriginal water ownership have been firmly established including, but not limited to, the NSW Water Strategy.⁵³ Aboriginal people in NSW continue to face enduring legacies from the dispossession of their lands and waters.⁵⁴ MLDRIN is of the view that this CAL change not only stems from an unjust process, but also constitutes a further winding back of First Nations' already miniscule water rights.⁵⁵ If this change goes unaddressed, we are deeply worried about the precedent it sets for the NSW Department (and other water agencies) to make further unjustified and unfair decisions and changes to legal instruments that disadvantage and further dispossess First Nations people and communities.

MLDRIN offers the following overarching observations and recommendations:

- This CAL change occurred in secret, is unjustified, and violates basic principles of procedural justice given that there has been no public or targeted consultation.
- This change is not permissible under, nor consistent with the objectives of, its enabling legal instruments (i.e. the *Water Management Act 2000* (NSW) or the Murrumbidgee Regulated WSP). It is a backwards step that undermines and contradicts the outcomes of Alluvium Consulting's recent Murrumbidgee CAL review and the NSW Water Strategy.
- The justification given for the WSP change (consistency with other inland surface water WSPs) is inaccurate and/or inconsistently applied.
- At a minimum, MLDRIN recommends that the unjustified and inequitable December 2022 change be reversed *immediately*. The NSW Government must undertake a complete consultation process with Murrumbidgee Traditional Owners, underpinned by free, prior, and

⁵² Alluvium Consulting Australia Pty Ltd (n 38).

⁵³ See NSW DPIE (n 17).

⁵⁴ Moggridge et al (n 22); Tony McAvoy, 'The human right to water and Aboriginal water rights in New South Wales' (2008) 17(1) *Human Rights Defender* 6; Rene Woods, Ian Woods and James A Fitzsimons, 'Water and land justice for Indigenous communities in the Lowbidgee Floodplain of the Murray–Darling Basin' (2022) 38(1) *International Journal of Water Resources Development*, 64; Lana D Hartwig et al, 'Water colonialism and Indigenous water justice in south-eastern Australia' (2022) 38(1) *International Journal of Water Resources Development*, 30.

⁵⁵ See Lana D 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(1) *Land Use Policy* Article 104869.

informed consent, if it wishes to pursue this amendment (or others) in the future. Such a process must properly and transparently explain the justification for such a change as well as its immediate and future implications for Nations. In such a process, Murrumbidgee Traditional Owners must be empowered to make the ultimate decision about the change, especially for WSP changes that directly and exclusively impact them.

- The Murrumbidgee Regulated WSP – and all NSW WSPs – must be amended to embed a rule requiring consultation of this nature so that similar situations do not arise in the future.

(4) Other matters

Other substantive provisions in the Murrumbidgee Regulated WSP

Beyond the CAL provisions, the Murrumbidgee Regulated WSP contains few other substantive mechanisms that help to meaningfully advance First Nations objectives. For instance, this WSP:

- Does not identify any cultural flows provisions in accordance with Cultural Flows as defined in the Echuca Declaration.⁵⁶
- Does not ensure that water flows are delivered through rivers and into wetlands and lakes at the right time for what Country needs or what Traditional Owners need (such as, but not limited to, continuing cultural practices and obligations to care for Country and to Nations downstream).
- Does not ensure that all parts of Country are watered, especially those at the end of the system, which some MLDRIN delegates consider to be the most neglected parts of Country. Current rules have impacts for the ecology and water quality, and this is only likely to worsen with climate change. And,
- Contains no acknowledgement or meaningful provisions (monetary or otherwise) to compensate Murrumbidgee Traditional Owners for past and ongoing water theft or mismanagement of the system, or the devastating ecological and cultural impacts and legacies this continues to create.

Overall, the current WSP is viewed by many Murrumbidgee Traditional Owner representatives as not giving any justice to First Nations people. Any future amendments to, or replacement of, the Murrumbidgee Regulated WSP must work to address these enduring issues and injustices.

Interconnectivity

Multiple water-related reviews and projects are currently underway in NSW (and elsewhere). It is essential that the NSW NRC's review of the Murrumbidgee Regulated WSP and the NSW Department's eventual replacement of the WSP fold in findings from these, or contain provisions that allow for this to happen in the future. Key examples of these other reviews, projects, and processes include (but are not limited to):

- NSW's Reconnecting Rivers Program
- Development and implementation of the NSW Government's Aboriginal Water Strategy
- Murrumbidgee Nations' work with MLDRIN on Nation-based Cultural Flows Management Plans and,
- NSW NRC's review of the *Water Sharing Plan for the Murrumbidgee Unregulated River Water Sources 2012*.

⁵⁶ The Echuca Declaration defines "Cultural Flows" as "water entitlements that are legally and beneficially owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is our inherent right." See <<https://www.mdba.gov.au/sites/default/files/pubs/sa-mldrin-echuca-declaration-2009.PDF>>.

As highlighted at the start of this submission, the current artificial separation and management of the Upper and Lower Murrumbidgee, and its regulated and unregulated components, goes against Traditional Owners' understandings of the connectivity of the whole system. For example, this way of talking about the Murrumbidgee interrupts Traditional Owners' cultural responsibilities to pass on clean and healthy water to downstream Nations and communities. We therefore recommend that NSW reconsider having two separate Murrumbidgee WSPs that work to segment the river. If two WSPs are absolutely necessary, then we request clarification on why this is the case and recommend that the two be better interconnected and integrated. Murrumbidgee WSP(s) must also interconnect with relevant groundwater WSPs more effectively.

Similarly, First Nations desire to see better connectivity to systems downstream of the Murrumbidgee. For this to happen, minimum end-of-system flow provisions in the Murrumbidgee Regulated WSP must be increased and, ideally, the timing of these flows adjusted and codified in the WSP. The NSW Government should partner with Murrumbidgee Traditional Owners in defining these new minimum flow arrangements so that they can reflect ecological and cultural needs and requirements.

Finally, the future replacement of the Murrumbidgee Regulated WSP must better address climate change and the impacts we know it will bring. This includes better modelling to account for a drying climate, and making sure that the WSP's water sharing arrangements and environmental flow rules are based upon and reflect this updated modelling.