

**Murray Lower Darling Rivers  
Indigenous Nations**



**Submission to the**

**Natural Resources Commission of NSW  
Riverina Bioregion Regional Forest Assessment  
River Red Gums and Woodland Forests**

**RESPONSE TO PRELIMINARY ASSESSMENT  
REPORT**

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## **Introduction**

The Murray Lower Darling Rivers Indigenous Nations (MLDRIN) thanks the Natural Resources Commission of NSW (NRC) for their preliminary assessment report. MLDRIN acknowledges the enormity of the process in gathering scientific and other evidence on our significant Red Gum Forests.

Of particular importance to Traditional Owners are the creation of new structures to ensure Indigenous ownership and involvement in Caring for Country and the protection of fragile eco-systems that are invaluable to Indigenous cultural heritage and contemporary cultural-economy.

MLDRIN is critical of the Indigenous consultation during the preliminary investigation but we recognise the tight timeframe the NRC has been given in this process and that the NRC resourced a broad meeting with Traditional Owners in late October 2009.

Having stated our concerns, we recognise that the core aspirations of protection, proper recognition of our inherent right to Country and our unique role in its maintenance and conservation, have been broadly articulated.

This submission will focus broadly on Indigenous aspirations for Caring for Country and on the recommendations that deal specifically with Indigenous peoples within the preliminary report.

In addition, this submission will firstly focus on International mechanisms and Commonwealth legislation and policy that support Indigenous control and management of land and waters.

The submission will also address the issue of Indigenous water rights and cultural flows. MLDRIN undertook an informed consent process to define “cultural flows” and to articulate the impacts and benefits and the operational considerations of such a watering regime.

It should be noted that specific Traditional Owner aspirations for caring for Country are expressed in submissions from the Yorta Yorta, Barapa Barapa and Wamba Wamba and Muthi Muthi peoples. MLDRIN fully supports those submissions. MLDRIN also acknowledges submissions from *Friends of the Earth* and the *National Parks Association of NSW*, which deal with Indigenous issues as well as broader conservation agendas.

As part of this submission we have attached relevant documents: *Indigenous Response to The Living Murray Initiative*, *Indigenous Rights to Water in the Murray Darling Basin*, the Memorandum of

Understanding between MLDRIN and the Murray Darling Basin Commission, the Environmental Defenders Report on Traditional Owner Involvement in NRM in NSW and a template of an Area Agreement. These documents are the intellectual property of MLDRIN and should not be used for any purpose without our approval.

Indigenous peoples of the Murray Darling Basin share histories, cultures, languages, kinship ties and religion and it is a very complex geographic and cultural landscape. The NRC may face situations of contested and/or shared Country. Do not let this experience deter your organisation from making recommendations that are in the best interest of Indigenous peoples and the environment.

I urge the Natural Resources Commission of NSW to be brave in their final recommendations, ensuring social justice for the first Nations and to fully recognise our role in caring for Country, which has sustained Australia for thousands of years.

Thank you for the opportunity to be involved in the NRC Red Gum Investigation.

In Unity

A handwritten signature in black ink, appearing to read 'M. Rigney', with a stylized flourish at the end.

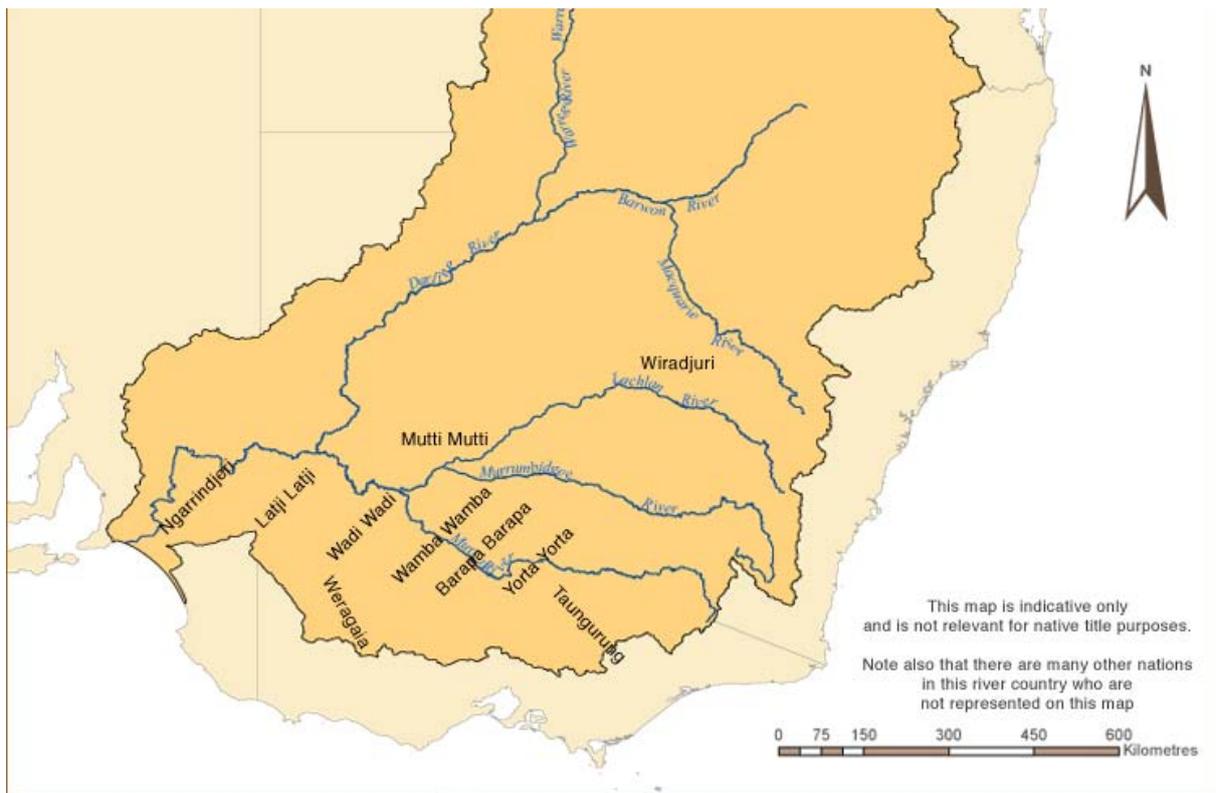
Matthew Rigney  
MLDRIN Chairman

## Background

The Murray Lower Darling Rivers Indigenous Nations is a confederacy of Indigenous Nations or traditional owners in the Lower Murray Darling Basin who come together to make collective decisions on our rivers in a respectful and holistic manner. The Confederate Indigenous Nations are:

Wiradjuri	Wadi Wadi
Yorta Yorta	Mutti Mutti
Taungurung	Latji Latji
Wamba Wamba	Wergaia
Barapa Barapa	Ngarrindjeri

Each of these Indigenous Nations have responsibilities unique to their territory in the Murray and Darling River valleys and are recognised under traditional laws and customs as having a spiritual, cultural and physical connection and responsibility for caring for homelands within their traditional boundaries. The map below is indicative of the Indigenous Nations (source J. Weir 2006)



## Our Vision

*The River Murray is a healthy living river system with natural flows and cycles.*

The River Murray and its Country must be:

- Healthy, clean and alive;
- Restocked and revegetated;
- Free flowing with natural cycles;
- Access rights for Indigenous people so they can move freely to continue cultural practice;
- Traditional fishing/hunting;
- Indigenous people and Nations recognised and respected for what and who we are;
- The rivers and tributaries are respected and cared for;
- Indigenous Nation recognised as sovereign entities in their own country; and
- The Forests must be appropriately watered including water allocations for a cultural purpose.

### *Respect for Country*

In the *Indigenous Responses to The Living Murray Initiative*, Indigenous peoples clearly identified concerns about the lack of respect not only for themselves, but also for the natural resources of the country.

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

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

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

## **Our Values and Principles**

*“A healthy Country including waters, using the lores, customs and self-determination of the traditional owners of the land. A healthy Country provides for the spiritual, cultural, economic and social benefits to those that depend on it”.*

### *Principles*

- Our core principle is that only traditional owners are best placed to talk for Country.
- The Sovereignty and inherent rights of traditional owners are never ceded.
- All Indigenous Nations are equal within the MLDRIN Confederacy.
- MLDRIN respects the diversity of Nations in relation to tradition, sites, stories, cultural practices and governance.
- Self-determination of the Nations and of MLDRIN is the only sustainable way to do business.
- Informed consent.

### *Values*

- Traditional lore and customs of the respective Indigenous Nations are paramount.
- The land and water are sacred, as is our knowledge of it.
- The River eco-system must be treated with respect because the land, waters and the people are interconnected.
- Caring for Country must be sustainable and respectful.
- Caring for Country means talking to each other, upstream and downstream.
- The role of Elders is held in the highest esteem and respect.
- Young people must be respected and involved in the Care for Country.

## **Indigenous Rights in Caring for Country**

This section on relevant international and Australian based mechanisms in land and water management illustrates the consistency require to ensure proper social justice including socio-economic, cultural and environmental outcomes for Indigenous peoples.

For Traditional Owners in the Murray Darling Basin there is a disjuncture between the rights recognised at the International, Commonwealth and in some cases State based legislation and policy, and the reality of Indigenous access and ownership of land and waters. This is evidenced in the land and water in the Indigenous estate within the Murray Darling Basin. It is often cited that 20% of land within Australia is in some form of Indigenous title, be it Native Title, hand-back or land owned by Aboriginal Land Councils. In the Murray Darling Basin less than 0.2% of land is within the Indigenous estate and very little water is owned by Indigenous Nations or communities. In essence everything in the Murray Darling Basin is allocated to communities, populations or industries other than Indigenous peoples.

The Natural Resources Commission of NSW should be cogniscent of this massive inequality when drafting the final recommendations of the Riverina River Redgum Assessment.

## **International Law**

### *Rio Declaration*

Indigenous participation in natural resources management, including involvement in public land management and use of such resources has been instituted as a right of Indigenous peoples in international law. There are a large number of conventions and international instruments with direct references to this right.

Principle 22 of the Rio Declaration on Environment and Development states:

Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

The UN *Convention on Biological Diversity* (1992) has been ratified by the Australian Government and it relates to the sustainable use and equitable benefit sharing of biodiversity. Articles 8(j) and 10(c) address the rights of Indigenous people. Article 8(j) states that each Contracting Party shall:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Article 10(c) states that each Contracting Party shall:

Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

The framework for implementing an access and benefit sharing regime arises under Articles 15 –19 of the Convention.<sup>1</sup> The Convention enshrines the principle that nations have sovereign rights over natural resources; that access to biological resources is on mutually agreed terms;<sup>2</sup> and subject to prior informed consent of the Contracting Party providing such resource.<sup>3</sup>

### *International Labor Organisation*

Furthermore, the *ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries* also specifically provides for Indigenous peoples rights in terms of Natural Resource Management. In particular, Article 15 specifies:

The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

These legal instruments confer rights on Indigenous peoples that can be separated into 5 distinct parts:

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<sup>1</sup> Articles 1-19.

<sup>2</sup> Article 15.4.

<sup>3</sup> Article 15.5.

- The right to participate in the use, management, protection and conservation of natural resources;
- The right to be consulted before natural resources on their lands are explored or exploited;
- The right to studies on the effects of such exploration and exploitation;
- The right to benefit in the profits made from any exploitation and use of natural resources; and
- The right to be compensated by government for any damages caused by such activities.<sup>4</sup>

Therefore, it is clear that international law recognises that Indigenous peoples have a right to participate in every facet of natural resource management in their respective countries. States must facilitate this process to comply with international law and with international human rights.

### *Ramsar Convention*

The involvement of Indigenous peoples in the management of *Ramsar* sites by Indigenous peoples is articulated in the “Guidelines for establishing and strengthening local communities’ and indigenous people’s participation in the management of wetlands” and endorsed at the Meeting of the Conference of the Contracting Parties to the Convention on Wetlands, San José, Costa Rica, 10-18 May 1999. The guidelines state:

“Experience has shown that it is advisable to involve local and indigenous people in a management partnership when:

- a) the active commitment and collaboration of stakeholders are essential for the management of a wetland (e.g., when the wetland is inhabited or privately owned);
- b) access to the natural resources within the wetland is essential for local livelihood, security and cultural heritage; and
- c) local and indigenous people express a strong interest in being involved in management.

Furthermore, the case for local and indigenous people’s involvement is even stronger when:

- a) local stakeholders have historically enjoyed customary/legal rights over the wetland;
- b) local interests are strongly affected by the way in which the wetland is managed;
- c) decisions to be taken are complex or controversial (e.g., different values need to be harmonised or there is disagreement on the ownership status of the land or natural resources);
- d) the existing management regime has failed to produce wise use;
- e) stakeholders are ready to collaborate and request to do so; and

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<sup>4</sup> International Labor Organisation, ‘*ILO Convention on Indigenous and Tribal Peoples 1989(169)- A Manual*’, (2003) at 37. \_

- f) there is sufficient time to negotiate among stakeholders in advance of management decisions being made”.

*United Nations Declaration on the Rights of Indigenous Peoples*

The UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP) was endorsed for signature by the Australian Government on 3 April 2009. The international instrument declares support for Indigenous involvement in the pre-amble, stating:

“*Recognising* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources”.

In addition, the preamble also declares that the survival and sustainability of Indigenous cultures is affined to recognition of inherent rights to country and by the control and management of country by Indigenous peoples themselves.

Furthermore, the preamble states that the sustainability of country relies on Indigenous traditional knowledge and of Indigenous land management.

Many of **Articles** of the *UNDRIP* also declares the need for the ownership and management of land and waters by Indigenous Peoples. For example **Article 26** states:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

The *UNDRIP* goes even further in declaring the need for compensation for lost lands and the need broader land justice. **Article 29** states:

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

#### **Recommendations:**

1. **The recommendations of the NRC should be consistent with these standards and mechanisms established and enshrined in international law; and**
2. **The NRC should recommend proper reporting requirements to adhere to international obligations of Australia, particularly within the *Ramsar Convention* and *United Nations Declaration on the Rights of Indigenous Peoples*.**

#### **Commonwealth Law**

Under Australia's federal system, most natural resource laws are state-based.<sup>5</sup> However, there are two federal statutes of relevance to the protection of Aboriginal natural resource rights and heritage.

The *Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act 1999)* is the primary federal Act dealing with heritage and biodiversity conservation. Through its objectives, it explicitly recognises the role of Aboriginal peoples in conserving biodiversity and heritage:

- 1) The objects of \_ are:
  - to promote a co-operative approach to the protection and management of the involving governments, the community, -holders and indigenous peoples;
  - to assist in the co-operative implementation of Australia's international responsibilities;
  - to recognise the role of indigenous people in the conservation and sustainable of Australia's ; and

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<sup>5</sup> There is no specific Commonwealth head of power in the Australian Constitution for natural resource management to be dealt with by the federal Government.

- to promote the use of indigenous peoples' knowledge of with the involvement of, and in co-operation with, the owners of the knowledge.

These objects are a broad and unambiguous recognition of the need to include Indigenous Australians in natural resource management and also contains an acknowledgement of the special and unique knowledge held by Aboriginal peoples.

This is also consistent with the *National Biodiversity Strategy* and a number of State based legislations such the *NSW Aboriginal Land Rights Act 1983* and the *NSW Aboriginal Heritage Act 2006*.

### *National Reserve System*

The study area of this investigation has been recognised as one of the highest priority bioregions for new conservation reserves in Australia by both the National Land and Water Resources Audit and the National Reserve System Directions report (NHT 2002, NRMMC 2005). In addition, as stated previously the amount of land within the Indigenous estate in this part of Australia is very low.

Under the Indigenous Protection Area and/or free-hold title hand-back regime of which there have been very few, there are appropriate Commonwealth resources for management by Indigenous peoples of this kind of land tenure. This kind of option offers a social justice dimension, economic and enterprise development dimension and an ecological protection dimension and is therefore a win/win situation for Traditional Owners, government and the general community.

### *MLDRIN/MDBC Memorandum of Understanding*

In addition, the *Memorandum between MLDRIN and the Murray Darling Basin Ministerial Council*, which includes the State of NSW, recognises the role of Traditional Owners in Natural Resource Management. It states that:

The Parties wish to:

- recognise in a positive, respectful and cooperative fashion that their activities comprise many shared interests and that their aspirations for natural resource management in the Murray and Darling River valleys have many shared goals;
- establish a realistic framework for collaboration in the natural resource management of the Murray and Darling River valleys;

- develop a transparent process of dialogue with, and further promote the meaningful involvement and engagement of, the Indigenous nations in the natural resource management of the Murray and Darling River valleys;
- ensure that the traditions of the Indigenous nations are incorporated into natural resource management policy development and implementation [MoU attached].

There are also a number of relevant Agreements that the State of NSW has with Traditional Owners that embed our participation in natural resource management, including the Agreement between Roads NSW and the Yorta Yorta and the Cooperative Agreement between the State of NSW and the Yorta Yorta over Barmah Forest.

### **New South Wales**

This section outlines the involvement of Traditional Owners in natural resource management in NSW and is taken from a report by the Environmental Defenders Office, which was commissioned by MLDRIN in 2007.

#### *Aboriginal land*

The Director-General of the NSW Department of Aboriginal Affairs observed “*For Aboriginal people land is central to our cultural and social wellbeing. Land is who we are.*”<sup>6</sup> In this context, to determine the efficacy of Indigenous inclusion in natural resource management, it is necessary to also examine the extent to which Aboriginal Australians can acquire and manage traditional lands. The ability for Indigenous Australians to acquire land holdings in NSW is governed by the *Aboriginal Land Rights Act 1983* and the *National Parks and Wildlife Act 1974*. This is in addition to rights under the *Commonwealth Native Title Act 1993*.<sup>7</sup>

The *Aboriginal Land Rights Act 1983* expressly acknowledges the unique relationship that Aboriginal Australians have with their traditional lands. The objects acknowledge:

- (1) Land in the State of New South Wales was traditionally owned and occupied by Aborigines;
- (2) Land is of spiritual, social, cultural and economic importance to Aborigines;

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<sup>6</sup> Jody Broun, Department of Aboriginal Affairs, *NSW Aboriginal people acquiring and managing land for conservation purposes* (2004), foreword.

<sup>7</sup> This paper does not address native title claims in detail.

- (3) It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land; and
- (4) It is accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation.

The main purposes of the Act are clear. They are: to provide land rights to Aboriginal persons in NSW, to establish Aboriginal Land Councils in which land is vested, and to enable land to be acquired by these councils.

The Act established a 3-tiered network of Aboriginal Land Councils in New South Wales consisting of the Aboriginal Land, 13 Regional Aboriginal Land Councils and 120 Local Aboriginal Land Councils. Their functions are to administer and facilitate Aboriginal land acquisition.<sup>8</sup>

Under the *Aboriginal Land Rights Act 1983*, land can be acquired in three ways:

- Through a land claim;
- Through compulsory acquisition; or
- Through the purchase or lease of privately held land.

A claim for Crown land can be made by a Local Aboriginal Council or the NSWALC under section 36 of the Act. In determining whether or not to grant the claim, the Crown Lands Minister must consider the following, whether the land is;

- lawfully used or occupied;
- needed or likely to be needed as residential land;
- needed or is likely to be needed, for an essential public purpose; and
- subject to a registered native title.

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<sup>8</sup> Section 106, *Aboriginal Land Rights Act 1983*. Local Aboriginal Land Councils (LALCs) are comprised of Aboriginal persons who are listed on the Local Aboriginal Land Council membership roll who reside within the area of have an association with the area. The NSW Aboriginal Land Council is the highest Council level, analogous to a state government. It is the peak representative Aboriginal body in NSW, presiding over 121 Local Aboriginal Land Councils. The Council consists of full-time Aboriginal [councillors](#) equal in number to the number of [Regional Aboriginal Land Council areas](#) in the State. The listed functions of the Council are extensive but include acquiring land on behalf of a LALC, making claims for Crown lands, making grants to Aboriginal communities or individuals and advising the Minister on matters of Aboriginal land rights.

The ALC may appeal to the Land and Environment Court if the claim is not accepted. If the claim is accepted, then the ALC is given freehold title. Therefore, subject to the planning laws, the ALC may deal with the land in any manner it chooses.

Where land is needed for the essential public purpose of nature conservation, the Minister may grant the claim subject to the condition that it is leased back to the government as a jointly managed National Park.

### *Joint management in NSW*

The joint management process was introduced into NSW by the *National Parks and Wildlife Amendments (Aboriginal Ownership) Act 1996* which amends the *National Parks and Wildlife Act 1974*. Under the *National Parks and Wildlife Act 1974*, Aboriginal people in NSW may claim ownership of certain conservation reserves or historic sites that are of natural and cultural significance.<sup>9</sup> The definition of ‘cultural significance’ is relatively broad. It enables the reservation of areas that are associated with a person, an event or historical theme or land containing a place, building, object, feature or landscape. Furthermore, land may be dedicated if the site helps to improve public understanding of Aboriginal culture. This is an acknowledgment of the extent to which land is part of Indigenous culture and the inextricable link between land, stories, places and people.

Land so dedicated must be managed in accordance with the 5 principles set out in the Act. These are:

- the conservation of natural values, buildings, places, objects, features and landscapes of cultural value to Aboriginal people in accordance with the cultural values of the Aboriginal people to whose heritage the buildings, places, objects, features or landscapes belong;
- the conservation of natural or other cultural values;
- allowing the use of the Aboriginal area by Aboriginal people for cultural purposes;
- the promotion of public understanding and appreciation of the Aboriginal area’s natural and cultural values and significance where appropriate; and
- provision for appropriate research and monitoring, in accordance with the cultural values of the Aboriginal people.

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<sup>9</sup> Section 30K, *National Parks and Wildlife Act 1974*.

If land is determined by the Minister to be of cultural significance, the land is added to Schedule 14 – ‘Lands of Cultural Significance to Aboriginals’ - of the *NPW Act 1974*. The current dedicated areas are:

- Biamanga National Park
- Gulaga National Park
- Jervis Bay National Park
- Mungo National Park
- Mootwingee Historic Site, Mootwingee National Park and Coturaundee Nature Reserve
- Mount Grenfell Historic Site
- Mount Yarrowyck Nature Reserve

To list further lands under Schedule 14 a proponent must make a submission to the Director-General of the Department of Environment and Conservation containing details of the cultural significance of the area. The Director-General must then prepare a cultural significance report. The Director-General must consider, amongst other things, whether the land claimed is a place of spiritual or mythological importance in accordance with Aboriginal custom or lore. The Minister then makes a decision after taking the report into consideration.

Once an area is added to Schedule 14, negotiations may commence. This is done for two purposes; to determine whether the Aboriginal Land Council wishes to go ahead with the joint process and, if this is the case, to determine the provisions of the proposed lease. This is because the Act requires that any Schedule 14 lands must be leased back to the Government. The Minister usually appoints an Aboriginal negotiating panel for the purpose of negotiating the lease. The lease must be for a term of at least 30 years, with no limitation on the amount of renewals. However, the lease must also acknowledge that the land is held on behalf of the traditional owners. Once the lease commences, rent is payable.

Once the lease is operational, a Board of Management is established comprising of between 11 and 13 members appointed by the Minister for Aboriginal Affairs. A majority must be Aboriginal owners of the land concerned. One must also be appointed from nominees of LALCs and one member must be from the Department of Environment and Conservation. The Board of Management is vested with the following responsibilities;

- (a) the care, control and management of the lands;
- (b) the preparation of plans of management for the lands; and

(c) the supervision of payments from the Fund with respect to the lands.

One of the special functions of the Board is to consider proposals for the carrying out, by Aboriginal owners or other Aboriginal persons, of cultural activities, such as hunting and gathering.

Commentators have been generally supportive of joint management initiatives such as those under the *National Parks and Wildlife Act 1974*. The International Institute for Environment and Development is of the opinion that such arrangements aid in the reconciliation of Indigenous and mainstream conservation aspirations for sustainable management.<sup>10</sup> Other commentators have found that this relationship ‘can forge a new and distinctive type of land use- a cultural national park that is appropriate to the spiritual connections of Indigenous people to the land and to the development of a distinctively Australian conservation ethic’.<sup>11</sup>

On the other hand, there is recognition of the difficulty in achieving true co-management. The imbalance between conservation agencies and Indigenous traditional owners often means that equal co-management is not achievable. It has been argued that many co-management regimes do not involve equal power sharing arrangements or any real kind of Indigenous self-determination.<sup>12</sup> Another potential criticism is that the legal framework of joint management retains much of the usual regulatory process, with the Minister having a dominant role, and co-management being confused for mere notice or public participation. However, with ongoing consultation, negotiation between the parties, and adequate resourcing of Indigenous communities, this imbalance can be redressed. [The full EDO report is attached]

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<sup>10</sup> International Institute for Environment and Development, ‘Sustaining Eden: Indigenous Community Wildlife Management in Australia’, *Australian Indigenous Law Reporter* (1999) 52 at 53.

<sup>11</sup> De Lacy (1992) in International Institute for Environment and Development, ‘Sustaining Eden: Indigenous Community Wildlife Management in Australia’, *Australian Indigenous Law Reporter* (1999) 52 at 53.

<sup>12</sup> Donna Craig, ‘Recognising Indigenous Rights Through Co-Management Regimes: Canadian and Australian Experiences’ *New Zealand Journal of Environmental Law* Vol 6, 2002: 199-255 at 254.

## **Caring for Country**

The MLDRIN Confederation has as our core principle the right to be involved in natural resource management and including free-hold title and joint management process over public and private lands is one of the strongest mechanisms to ensure that participation.

MLDRIN broadly supports the concept of hand-back and jointly managed National Parks and Reserves if that is the aspiration of the relevant Traditional Owners. The models of land management must be suited to individual Traditional Owner groups, which can only be arrived at after a proper informed consent process.

### **Recommendations:**

- 1. That the NRC consider as its first option the hand-back of these forests as free-hold title to Traditional Owners;**
- 2. That the NRC recommend a process for reconciling disputed areas or shared country (land which includes a number of traditional owner boundaries) in the study area as part of a process of land tenure change. This is similar to process already undertaken when jointly managed National Parks are established and could be facilitated by Traditional Owners, Native Title Services Corp of NSW and/or the NSW Land Rights Registrar;**
- 3. That the NRC consider the holistic management of these forests within the broader River Murray eco-system and that the land tenure reflect the international, national and local importance of these places;**
- 4. That if free-hold tenure is not considered that other forms of title such as jointly managed National Parks with majority Traditional Owner board composition to ensure conservation and indigenous access agendas;**
- 5. That once the final recommendations are made that a broad informed consent process be undertaken with the relevant Traditional Owners to ascertain the most suitable model of land tenure and the associated management for those forests;**
- 6. That any rent paid under lease-back arrangements be a negotiated amount using informed consent processes; and**
- 7. That appropriate resources for any new land tenure and associated on-going activities, which is negotiated with Traditional Owners, be considered in the final recommendations.**

### **Agreement Based Approaches**

For those Nations who do not want hand-back or joint management of forests or that are not ready in their current capacity it may be appropriate to have Area Agreements over relevant Country. This could be used a final arrangement or as a interim arrangement once the Traditional Owners are ready for joint management.

As an example, an Agreement could cover the following objectives, commitments undertakings by the NSW Government:

*The State of NSW acknowledges that [Indigenous Nation(s)] is/are the traditional owners of the country within which the said River Red Gum Forest forms a part.*

*The State of NSW acknowledges that the said River Red Gum Forest represents part only of the country of [Indigenous Nation(s)].*

*The State of NSW commits to ongoing negotiation with and direct involvement of [Indigenous Nation(s)] during the pre-planning, planning, construction, rehabilitation and maintenance of all Projects;*

*The State of NSW commits negotiations for eventual joint management arrangements.*

*The State of NSW also undertakes to ensure that:*

- (a) it shall use best efforts to protect and to not affect inherent rights of [Indigenous Nation(s)] in all its dealings;*
- (b) any and all Projects, including the route of each Project, shall not damage the natural environment and flood water flows and shall protect the Cultural Heritage and Cultural Economy of [Indigenous Nation(s)];*
- (c) post construction and installation shall be in accordance with best Environmental standards, with representatives from [Indigenous Nation(s)] concerned involved as active participants.*

There are other specific objectives, commitments and other undertakings regarding Indigenous involvement in land management which could be included in an Area Agreement [example of a pro-forma Area Agreement is attached].

**Recommendations:**

- 1. For those Nations that do not want or are not ready for hand-back of free-hold or joint management arrangements that the State of NSW enter into legally binding Agreements over the relevant River Red Gum Forest Area, either as a permanent arrangement or as an interim arrangement until the Traditional Owners have the capacity to manage the relevant reserve/National Park; and**
- 2. That resources are provided to Traditional Owner groups build their capacity and governance processes in lieu of hand-back or joint management arrangements if they so desire.**

## **Water Rights and Cultural Flows**

### **Water Rights**

**[This section is from an AIATSIS Discussion Paper: *Indigenous Water Rights in the Murray Darling Basin* by Monica Morgan, Lisa Strelein and Jessica Weir 2004. Discussion paper is attached]**

Water is central to the survival of Indigenous peoples in Australia. Indigenous peoples' survival depended upon knowledge of the both the episodic and seasonal behaviour of the creeks and rivers, reliable water holes, and the availability of swamps, springs and soaks. Careful management of the natural resources of the Murray meant that food would be available for important gatherings of thousands of people held over several days. The right to use and to take water is an essential part of the historical and contemporary lives of Indigenous Nations.

Today, water continues to be central to the survival of Indigenous people in Australia. As stated earlier in this discussion paper, the River Murray is central to cultural, spiritual, social, and economic sustainability and identities of the Indigenous Nations. The right of Indigenous peoples to use and take water has been recognised in various native title determinations. The Martu and Ngurrara Peoples' determination, for example, recognized the right to 'take, use and enjoy the flowing and subterranean waters in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs, including the right to hunt on and gather and to fish from the flowing and subterranean waters'.

The difficult task of determining how best to manage the scarce water resources of the Murray River cannot side-step the inherent rights of Indigenous Nations to the use, access, enjoyment and economic utility of the water of the Murray.

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

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

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

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

## **Cultural Flows**

### **Cultural Flow Background**

#### *Cultural Context*

Indigenous Nations are and have been since time immemorial connected and responsible for their lands and waters, and the peoples of each Indigenous Nation obtain and maintain their spiritual and cultural identity, life and livelihood from their lands and waters.

In addition, Indigenous Nations each have responsibilities and obligations under their Indigenous Law/Lore and Custom to protect, conserve and maintain the environment and the ecosystems in their natural state to ensure the sustainability of the whole environment.

In November 2007, Indigenous peoples from the Nations represented within MLDRIN met in Echuca to come to an agreement on a definition of “cultural flows” and to discuss its impacts and benefits.

#### *Socio-economic context*

As stated previously it is often cited that within Australia, the percentage of land in the Indigenous estate is around 20%. However within the Murray Darling Basin Indigenous peoples currently hold less than 0.2% of land, despite comprising approximately 4% of the Basin’s population, and despite land reforms such as the *NSW Aboriginal Land Rights Act 1983* and *Native Title Act 1993*.

The right to water and access to water is supposed to be provided by the National Water Initiative and other Commonwealth and State mechanism but many of these are contingent upon positive Native

Title determinations. Given the current disparity of Indigenous land tenure within the MDB, access to water for Indigenous peoples is also severely limited and restricted.

Part of this issue is the fact that Cultural Flows have not been on the political agenda in Australia, nor within discussions around natural resource management.

#### *Cultural Flow Definition*

***“Cultural Flows” are 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”.***

#### *Impacts and Benefits of Cultural Water*

Cultural Water can be used for the following purposes:

- Empowerment and social justice - water is delivered to Country by the peoples;
- Growing native plants;
- Protecting and hunting animals;
- Song, dance, art and ceremony;
- Spiritual sites; and
- Improved cultural-economic and health outcomes through the provision of food, medicines and materials for art.

#### *Operation and volume*

The difference between environmental and cultural water is that it is the Indigenous peoples themselves deciding where and when water should be delivered based on traditional knowledge and their aspirations. This ensures Indigenous peoples are empowered to fulfil their responsibilities to care for Country.

Questions of volume need to be explored through scoping work with the Nations. However the volume of water needed to bring the Rivers back a healthy state is well-known, as articulated by the Wentworth Group of Scientists and a number of Environmental Groups. The share of that water which indigenous peoples manage should be negotiated using informed consent and good faith processes.

Furthermore, MLDRIN has been involved in *The Living Murray's Indigenous Partnerships Project* (IPP) which has at its core the full participation of Indigenous peoples in the natural resource management, particularly water management through the drafting and implementation of environmental watering plans. The IPP is piloting Use and Occupancy mapping will be used by the piloted Nation and MLDRIN will assist in incorporating Indigenous knowledge into the environmental watering plans. This will give a good indication of where, when and how much water is required in a cultural flow at the TLM Icon Sites.

Further work will need to be done to ascertain cultural flows for other parts of Country.

### **River Red Gums and Cultural Flows**

The right to water by Indigenous as outlined above is enshrined in the *Native Title Act* 1993, as is articulated in the National Water Initiative. Much of the focus on allocated water to Indigenous peoples has focussed on enterprise development at the expense of cultural purposes and/or purposes that support cultural economy - the NSW Aboriginal Water trust is one such example.

A broadening of the scope of water usage for Indigenous peoples to include all of the considerations such as economic development and cultural purposes needs to occur, as well as broadening the policy scope to include all Traditional Owners, not just Native Title holders.

It is MLDRIN's belief that the State of NSW is in a unique position to create enormous cultural and economic benefit to NSW Traditional Owners by allocating water for a cultural purpose. A cultural flow also has strong social justice outcomes.

This process should be negotiated with Traditional Owners including questions of volume, location and scope of impacts, benefits and usage of cultural flows.

#### **Recommendation:**

- 1. That in negotiation with Traditional Owners, cultural flows for a cultural purpose is implemented into hand-back or joint management and/or other Agreement arrangements with the relevant Traditional Owners.**

## **Specific Comments on the NRC Preliminary Assessment Report**

This section addresses the NRC Preliminary Assessment Report, in particular the Indigenous section of the Report.

### *Section 3.5.1 Aboriginal Heritage, Pg 88-95*

- The on Aboriginal Heritage relegates Indigenous connection and management of Country to a historical context. The contemporary relationship and ongoing use and occupancy of country is underplayed. Much of this relationship can be garnered from the actual engagement with Indigenous peoples through oral histories and through projects such as the use and occupancy survey projects. Both the Yorta Yorta and Wamba Wamba have completed these surveys and may mention and/or submit their maps in their respective submissions.
- Aboriginal sites can be accessed through the Aboriginal Sites register, managed by the Department of Environment, Climate Change and Water and accessible via the respective local Aboriginal Land Council.
- Traditional Owner knowledge systems and science have not been paid the attention and respect they deserve – this includes fire management regimes and contemporary management of country such as weed eradication programs and feral animal control.
- Climate Change and its effects on Indigenous peoples have not been articulated. The IPCC has stated that climate change will adversely affect Indigenous access to land and waters. There is also an exciting opportunity for emerging climate change economies and Indigenous peoples that should be explored and a further justification for a change in land tenure that better involves Indigenous peoples. This can include land restoration projects and sequestration and bio-banking initiatives.
- The map on page 91 of the Preliminary Report is inaccurate and incredibly problematic.
- The EIS process undertaken by NSW Forestry and MLDRIN was not complete and should not be given the credence it has been in this report. NSW Forestry ignored many of findings of the report generated by this engagement.
- The consultation summary in Table 17 on page 94 is inaccurate. The General Comments relating to MLDRIN's position is not correct – the position that is stated is has never been articulated by MLDRIN either informally or formally at a MLDRIN meeting.

#### **Recommendations:**

- 1. Much of the language of this section is in past tense and this should be changed to reflect the contemporary and on-going connection to Country;**

- 2. A more rigorous investigation of cultural heritage sites and contemporary connection sites be undertaken for the final report;**
- 3. Climate Change and the potential for Indigenous peoples in an emerging carbon economy should be explored in the final report;**
- 4. The map on page 91 should be deleted from the final report with a disclaimer that this map should not have been included in any report; and**
- 5. The General Comment attributed to MLDRIN in Table 17 on page 94 should be deleted.**

# ***MEMORANDUM OF UNDERSTANDING***

**Between**

**MURRAY LOWER DARLING RIVERS INDIGENOUS NATIONS**

**and**

**MURRAY-DARLING BASIN COMMISSION**

**In respect of**

**a framework for the participation of the MURRAY LOWER DARLING RIVERS INDIGENOUS  
NATIONS in the management of the natural resources of the Murray and Darling River valleys  
below the Menindee Lakes Storage**

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## MEMORANDUM OF UNDERSTANDING

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**MEMORANDUM OF UNDERSTANDING** made the twenty third day of March 2006,  
between:

**MURRAY LOWER DARLING RIVERS INDIGENOUS NATIONS ("MLDRIN")**  
for the Indigenous nations, represented by those whose names and signatures appear in the  
signature block at the end of this Memorandum;

and

**MURRAY-DARLING BASIN COMMISSION ("the Commission")**  
of 15 Moore Street, Canberra in the Australian Capital Territory,

and to be known as the Parties.

### 1 RECITALS

#### MLDRIN

- 1.1 MLDRIN is a confederation of traditional owner groups, each with responsibilities unique to their territory in the Murray and Darling River valleys and that are recognised under traditional laws and customs as having a spiritual, cultural and physical connection and responsibility for caring for homelands within their traditional boundaries.
- 1.2 MLDRIN is formed for the purposes of, amongst other things:
  - 1.2.1 expressing to the Commission, State agencies and other bodies the views and the perspectives of the Indigenous nations; and
  - 1.2.2 providing for the involvement of the Indigenous nations,in respect of the management of natural resources in the Murray and Darling River valleys.
- 1.3 MLDRIN carries out the purposes referred to in clause 1.2 by:
  - 1.3.1 creating a forum for the Indigenous nations to express views in respect of natural resource management;
  - 1.3.2 providing a united base, which strives to ensure equity, access to, and participation in the processes of natural resources management; and
  - 1.3.3 coordinating the expression of views referred to in this clause.

#### The Commission

- 1.4 The Commission is an inter-governmental body set up under the Murray-Darling Basin Agreement dated 24th June 1992. The purpose of the Murray-Darling Basin

Agreement is to promote and coordinate effective planning and management for the equitable, efficient and sustainable use of the water, land and other environmental resources of the Murray-Darling Basin.

- 1.5 The Murray-Darling Basin Ministerial Council through the Commission:
- 1.5.1 manages the waters of the River Murray and Darling River below the Menindee Lakes Storage;
  - 1.5.2 advises on policies and programs for the management of the Murray-Darling Basin's environmental resources; and
  - 1.5.3 oversees the implementation of policies and programs aimed to help achieve sustainable environmental resource use.

## **2 DEFINITIONS**

- 2.1 For the purposes of this Memorandum:
- 2.1.1 'Indigenous nations' means the traditional owner groups who are Parties to this Memorandum of Understanding referred to in Clause 1.1; and
  - 2.1.2 'natural resources' means the water, land and other environmental resources managed by the Commission as referred to in clauses 1.4 and 1.5, consistent with the Murray-Darling Basin Ministerial Council's Integrated Catchment Management Policy as in force from time to time; and
  - 2.1.3 'confederation' means an alliance of traditional owner groups for a common purpose; and
  - 2.1.4 'cultural heritage' means a place or object that is of significance to Indigenous persons in accordance with their practices, observances, customs, traditions, beliefs, folklore or history.

## **3 OTHER ARRANGEMENTS OR AGREEMENTS**

- 3.1 This Memorandum:
- 3.1.1 does not supersede or preclude other arrangements or agreements; and
  - 3.1.2 recognises the existence of the Murray Lower Darling Rivers Indigenous Nations Memorandum of Understanding with the New South Wales Department of Land and Water Conservation dated 14<sup>th</sup> October 2001.

## **4 PURPOSE OF THIS MEMORANDUM**

- 4.1 The Parties wish to:
- 4.1.1 recognise in a positive, respectful and cooperative fashion that their activities comprise many shared interests and that their aspirations for natural resource management in the Murray and Darling River valleys have many shared goals;
  - 4.1.2 establish a realistic framework for collaboration in the natural resource management of the Murray and Darling River valleys;

- 4.1.3 develop a transparent process of dialogue with, and further promote the meaningful involvement and engagement of, the Indigenous nations in the natural resource management of the Murray and Darling River valleys;
- 4.1.4 ensure that the traditions of the Indigenous nations are incorporated into natural resource management policy development and implementation; and
- 4.1.5 create mechanisms and processes by which the purposes of this Memorandum might be achieved.

## **5 ESTABLISHMENT OF RELATIONSHIP**

### **Nature of Relationship**

- 5.1 The Parties agree that by this Memorandum of Understanding they establish a cooperative relationship, to help ensure that the natural resources of the Murray and Darling River valleys are managed in a manner which recognises and assures that the 'efficient and sustainable' use of those resources carries benefits to the Indigenous nations in relation to their cultural heritage, including without limitation, their spiritual, social, customary and economic values for the use of land and water.

### **Acknowledgement of status of MLDRIN**

- 5.2 The Parties acknowledge and agree that:
  - 5.2.1 communication on the Indigenous nations' views and perspectives on natural resource management issues is best coordinated through MLDRIN, without the exclusion of other interested Indigenous groups; and
  - 5.2.2 traditional methods and processes are the most effective means of communications with the Indigenous nations and should be respected by all Parties.

## **6 MECHANISMS TO PROMOTE OBJECTIVES**

### **Representatives to work together**

- 6.1 The Parties agree that their representatives will work together in such manner as they may agree, in order to exchange experience and information for the purpose of advancing the cooperative arrangements referred to in clause 0.

### **The Commission's responsibilities**

- 6.2 The Commission shall use the process established in this Memorandum as a model for consultation about issues relevant to it in relation to its responsibilities under the Murray-Darling Basin Agreement 1992 by providing:
  - 6.2.1 a forum to enable the Indigenous nations to present and discuss issues in relation to natural resource management in the Murray and Darling River valleys below the Menindee Lakes storage, with respect to the Commission's activities;

- 6.2.2 to MLDRIN and the Indigenous nations appropriate resources agreed by both Parties to undertake the roles referred to in this Memorandum;
- 6.2.3 access to relevant information, expertise and data, as agreed by both Parties, that MLDRIN and the Indigenous nations may reasonably require with respect to natural resource management in the Murray and Darling River valleys below the Menindee Lakes storage which, in content and format, is useable by MLDRIN and the Indigenous nations for the purposes of this Memorandum.

### **MLDRIN's responsibilities**

- 6.3 MLDRIN shall:
  - 6.3.1 promote the participation of the Indigenous nations along the Murray and Darling River valleys below the Menindee Lakes storage in the model processes referred to in this Memorandum;
  - 6.3.2 facilitate cooperation and coordination between the Indigenous nations and Government in achieving the obligations of the Commission and policy and legal commitments of Governments and their agents in respect of the protection of natural resources and cultural heritage;
  - 6.3.3 promote issues of common concern to the Indigenous nations;
  - 6.3.4 establish processes for interaction between the Commission and the Indigenous nations, which respect traditional methods/processes of communication.

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

- 6.4 The Parties will develop agreed general frameworks and processes to enable each of the Indigenous nations to reach understandings and agreements with the Commission on all issues of common concern in order to facilitate the resourcing of activities consistent with this Memorandum, including, but not limited to:
  - 6.4.1 representation, participation and engagement in the process of natural resource management;
  - 6.4.2 cultural heritage;
  - 6.4.3 social and economic outcomes; and
  - 6.4.4 identifying and agreeing activities of mutual interest, incorporating:
    - a) what action is required;
    - b) what resourcing is required;
    - c) what is to be delivered; and
    - d) how progress will be monitored, reviewed and evaluated.

## **7 DISPUTE RESOLUTION**

### **Notification**

- 7.1 If a dispute arises between the Parties relating to this Memorandum, the party claiming the dispute agrees to notify the other party to the dispute in a timely manner giving details of the dispute.

### **Consultation**

- 7.2 The parties to a dispute agree to use their best endeavours to resolve the dispute through direct consultation and negotiation between each parties nominated representatives.

### **Good faith**

- 7.3 Each party to a dispute agrees that all consultation and negotiations are to be conducted in good faith and in a respectful, cooperative and timely manner in accordance with the principles and framework specified in this Memorandum.

## **8 LIABILITY FOR LOSS OR DAMAGE**

- 8.1 No Party has an obligation or liability to the others under this Memorandum for loss or damage suffered as a result of participating in the processes and activities described in this Memorandum.

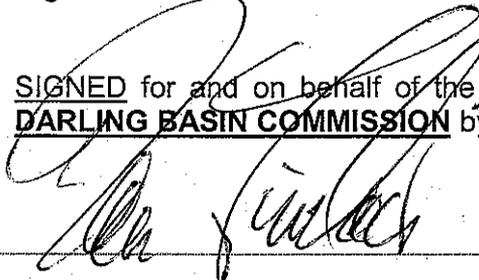
## **9 TERM OF MEMORANDUM AND EFFECT**

- 9.1 This Memorandum:

- 9.1.1 may be amended at the request in writing of any Party, with the agreement in writing of the other Parties;
- 9.1.2 will be reviewed after a period of three years from the date of signing, and be renewed subject to agreement by both Parties;
- 9.1.3 is non-exclusive of any other association relationship or agreement which any of the Parties may at any time wish to enter and is not intended to and does not create any legally binding obligations or enforceable rights;
- 9.1.4 is not intended to and does not affect any legal or political rights and interests of any Party to this Memorandum of Understanding; and
- 9.1.5 is not a treaty.

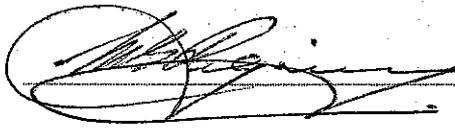
Signed as a Memorandum of Understanding

SIGNED for and on behalf of the MURRAY-DARLING BASIN COMMISSION by:

  
\_\_\_\_\_

Signature

The Right Honourable Ian Sinclair AC,  
President, Murray-Darling Basin  
Commission

  
\_\_\_\_\_  
\_\_\_\_\_

Witness

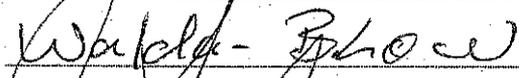
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SIGNED for and on behalf of  
MURRAY LOWER DARLING RIVERS INDIGENOUS NATIONS  
by the authorised representatives of the Indigenous nations, as follows:

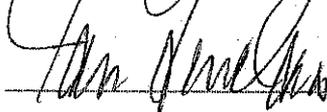
SIGNED for and on behalf of the YORTA  
YORTA PEOPLES:

  
\_\_\_\_\_

Signature

  
\_\_\_\_\_

Name(Print)

  
\_\_\_\_\_

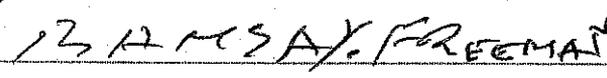
Witness

Name of Witness (Print)

SIGNED for and on behalf of the WIRADJURI  
PEOPLES:

  
\_\_\_\_\_

Signature

  
\_\_\_\_\_

Name(Print)

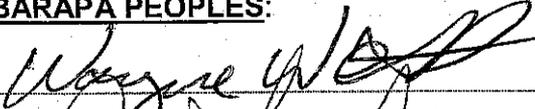
  
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Witness

  
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Name of Witness (Print)

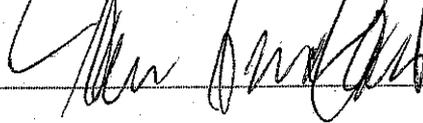
SIGNED for and on behalf of the **BARAPA**  
**BARAPA PEOPLES:**



Signature

WAYNE WEBSTER

Name(Print)



Witness

Name of Witness (Print)

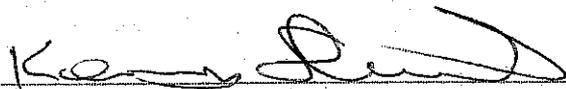
SIGNED for and on behalf of the **WAMBA**  
**WAMBA PEOPLES:**

T. Hamilton

Signature

Tracy Hamilton

Name(Print)

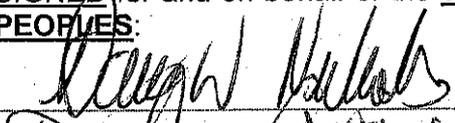


Witness

Kenneth STENART

Name of Witness (Print)

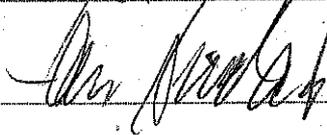
SIGNED for and on behalf of the **WADI WADI**  
**PEOPLES:**



Signature

DOUG NICHOLS

Name(Print)



Witness

Name of Witness (Print)

SIGNED for and on behalf of the **MUTHI**  
**MUTHI PEOPLES:**

Mary Pappin

Signature

MARY PAPPIN

Name(Print)



Witness

Garry J Pappin

Name of Witness (Print)

**SIGNED** for and on behalf of the **LATJI LATJI PEOPLES:**

Ralph Harradine

Signature

RALPH HARRADINE

Name(Print)

Stanley Harradine

Witness

STANLEY HARRADINE

Name of Witness (Print)

**SIGNED** for and on behalf of the **WERAGAIA PEOPLES:**

Peter J.P. Mertikos Jr

Signature

PETER J. MERTIKOS JR

Name(Print)

Stanley Harradine

Witness

\_\_\_\_\_

Name of Witness (Print)

**SIGNED** for and on behalf of the **TAUNGURUNG PEOPLES**

Crest S. Jones

Signature

\_\_\_\_\_

Name(Print)

Stanley Harradine

Witness

\_\_\_\_\_

Name of Witness (Print)

**SIGNED** for and on behalf of the **NGARRINDJERI PEOPLES:**

Stanley Harradine

Signature

\_\_\_\_\_

Name(Print)

Stanley Harradine

Witness

\_\_\_\_\_

Name of Witness (Print)