



Australian  
Human Rights  
Commission

*everyone, everywhere, everyday*

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# Inquiry into the Water Amendment Bill 2008

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Australian Human Rights Commission

Submission to the Senate Rural and Regional  
Affairs and Transport Standing Committee

7 November 2008

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## 1 Introduction

1. The Australian Human Rights and Commission (the Commission) makes this submission to the Senate Rural and Regional Affairs and Transport Standing Committee in its Inquiry into the *Water Amendment Bill 2008*.

## 2 Summary

2. The Commission supports and commends the relevant state governments' and the ACT government's progress in referring constitutional powers to the Commonwealth, enabling water resources in the Murray-Darling Basin to be managed in the national interest, optimising environmental, economic and social outcomes.
3. However, the Commission is concerned that particular icon sites listed under the Ramsar Convention<sup>1</sup> are currently inadequately managed and protected. The Commission hopes that this will be improved under the new arrangements.
4. Additionally, the Commission notes that the Ramsar Convention provides guidelines for establishing and strengthening local communities' and indigenous peoples' participation in the management of wetlands focusing on the need for indigenous engagement and participation, trust and capacity building, knowledge exchange, flexibility and continuity.<sup>2</sup> The Commission notes that to date there has not been appropriate inclusion of Indigenous peoples in Ramsar processes in Australia.
5. The Commission notes that the Bill provides for the transfer of the current powers and functions of the Murray-Darling Basin Commission as outlined in the Murray-Darling Basin Agreement, to the new Murray-Darling Basin Authority. The Commission is concerned that there is currently no mandatory provision for Indigenous representation on the Authority or on the Advisory Committee's established by the Authority.
6. The Commission notes that the Bill aims to complement the Commonwealth Government's *Water for the Future* plan announced by the Minister for Climate Change and Water on 29 April 2008, which provides \$12.9 billion funding to support governance and water resource management reforms including:
  - (a) establish the Murray-Darling Basin Authority
  - (b) improve water information

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<sup>1</sup> Australia was one of the first countries to sign the Ramsar Convention, and Australia designated the world's first Wetland of International Importance: Cobourg Peninsula Aboriginal Land and Wildlife Sanctuary in the Northern Territory, in 1974. The Ramsar Convention is directly linked to the Convention on Biological Diversity and Ramsar wetlands are recognised as a matter of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999*.

<sup>2</sup> Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands, adopted as an annex to Resolution VII.8 (1999). At [http://www.ramsar.org/key\\_guide\\_indigenous.htm](http://www.ramsar.org/key_guide_indigenous.htm) (viewed 3 October 2008).

- (c) sustainable rural water use and infrastructure programs
  - (d) purchasing water to improve the health of the rivers and wetlands in the Murray-Darling Basin.
7. The Commission notes that the Bill expands the mandatory content of the Basin Plan to include arrangements for ‘critical human water needs’ for those communities dependent on the waters of the River Murray System.
  8. However, the Commission is concerned that the Bill does not include the rights of Indigenous peoples to water in the definition of ‘critical human water needs’.
  9. The Commission is concerned that the implications for native title and land rights have not been adequately considered or addressed. This is particularly relevant to the interplay between Indigenous land rights and cultural heritage regimes in each of the Basin states, and in the impact on native title rights and interests.
  10. The Commission is of the view that the *Water Amendment Bill 2008* does not provide adequate protection of the rights and interests of the Indigenous peoples’ of the Murray-Darling River Basin.
  11. Further amendments to the Bill should expand the scope of the Bill to:
    - (a) Align the *Water Act 2007* with federal and state legislation, particularly those relating to Aboriginal and Torres Strait Islander land rights, cultural heritage, environmental protection, the *Native Title Act 1993*, and climate change legislation when it is drafted.
    - (b) Realise the rights of Indigenous peoples whose country lies within the Murray-Darling River Basin, to participate in the management of the Murray-Darling River Basin and associated wetlands by providing for mandatory Indigenous representation on the Authority and associated advisory committee’s.
    - (c) Realise the rights of those Indigenous peoples whose country lies within the Murray-Darling River Basin to access allocations of water for cultural purposes by including Indigenous cultural flows as a priority identified under the proposed Part 2A, ‘Critical human water needs’.

### **3 Recommendations**

12. The Australian Human Rights Commission recommends that:
  - (a) the Government fully recognise the significance of the Murray-Darling River Basin to the Indigenous peoples whose lands lie within the Basin, and incorporate their distinct rights to water, the environment, economic development, participation and engagement into the *Water Act 2007*.
  - (b) the *Water Amendment Bill 2008* provide that the power of the Authority to acquire, hold and dispose of real and personal property, to contract and to lease lands for the purposes of the Authority, must be with the

exception of those lands secured for the benefit of Indigenous peoples and their communities, unless it is with the free, prior and informed consent of the Indigenous peoples whose rights are being affected.

- (c) the *Water Amendment Bill 2008* amend s 178(2) of the *Water Act 2007*, to make provision for mandatory Indigenous membership on the Murray-Darling Basin Authority; and s 202(5) of the *Water Act 2007*, to make provision for mandatory Indigenous membership on the Basin Community Committee.
- (d) the *Water Amendment Bill 2008* amend s 202(3) of the *Water Act 2007*, to provide that the Basin Community Committee must establish an Indigenous water subcommittee.
- (e) Subsection 86A(2) of the *Water Amendment Bill 2008* be expanded to recognise 'Indigenous cultural flows' as a 'critical human water need'.
- (f) the *Water Amendment Bill 2008* amend s 202(7) of the *Water Act 2007*, to specifically provide that water users for Indigenous cultural purposes is included in the definition of water users.

#### **4 Scope and Intent of the Bill**

- 13. The Commission notes that the Bill amends the *Water Act 2007* which commenced on the 3 March 2008.
- 14. The Bill gives effect to the intergovernmental *Agreement on Murray-Darling Basin Reform* (Reform IGA), which was signed by the Prime Minister, and the Premiers of New South Wales, Victoria, Queensland and South Australia, and the Chief Minister of the Australian Capital Territory at the Council of Australian Governments Meeting on 3 July 2008.
- 15. The Bill will:
  - (a) enable the transfer of the current powers and functions of the Murray-Darling Basin Commission to the new Murray-Darling Basin Authority
  - (b) strengthen the role of the Australian Competition and Consumer Commission by extending the application of the water market rules and water change rules
  - (c) enable the Basin Plan to provide arrangements for meeting critical human water needs.
- 16. The Bill will be based on a combination of Commonwealth constitutional powers and a referral of certain powers from the Basin States to the Commonwealth.

#### **5 The Indigenous peoples of the Murray Darling**

- 17. Indigenous peoples are connected to and responsible for their land and waters and in turn Indigenous peoples obtain and maintain their spiritual and cultural identity, life and livelihood from their lands and waters.

18. The Murray- Darling River Basin is home to a number of Indigenous Traditional Owner groups across the five states and territory. These Traditional Owner groups include the Ngarrindjeri, Kurna, Peramangk, Wamba Wamba, Wadi Wadi, Wiradjuri, Yorta Yorta, Muthi Muthi, Mungatanga, Barkindji, Taungurung, Latji Latji, Wergaia, Wotjabulak, Barapa Barapa, Gamilaroi, Bugditji, and Nyiamppa Nations.
19. The Traditional Owner groups of the Murray-Darling River Basin region identify as Indigenous Nations. For the purposes of this submission, the term 'Indigenous Nations' will be used to mean the same as 'Indigenous peoples'.
20. While these Indigenous Nations, are independently identified based on their inherent cultural diversity and their traditions, sites, stories and cultural practices; they all share a vision for the Murray-Darling River Basin – and that is a healthy, living river with natural flows and cycles, sustaining communities and preserving its unique values.
21. The Indigenous Nations of the Murray-Darling River Basin possess distinct cultural and customary rights and responsibilities including: a spiritual connection to the lands, waters and natural resources of the Basin; management of significant sites located along the river banks, on the river beds, and sites and stories associated with the water and natural resources located in the rivers and their tributaries; protection of Indigenous cultural heritage and knowledge; accessing cultural activities such as hunting and fishing, and ceremony.
22. For the Indigenous Nations of the Murray-Darling River, the water is not separate to the river and the river is not separate from the water. The river incorporates all of the lands and natural resources that rely on the water, and without the necessary management of the river and its lands and natural resources the water disappears.
23. The river provides life through food and quality drinking water to Indigenous Nations, as it does to the Australian community. It has spiritual and cultural significance and also provides natural medicines to heal sickness, and enjoyment for recreational purposes. The natural flows and cycles feed all the rivers parts such as the tributaries, creeks, and nurseries. The native wildlife and plant depend on the river for survival. The entire ecosystem in and around the river needs to be maintained and looked after. If water is unhealthy, everything else will decline.<sup>3</sup> Indigenous peoples have an obligation under their traditional law and custom to protect, conserve, and maintain the environment and the ecosystems in their natural state to ensure the sustainability of the whole environment.
24. Historically Indigenous peoples have been excluded from water management. There are low levels of awareness among Indigenous peoples of water

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<sup>3</sup> M Morgan, L Strelein, J Weir, *Indigenous Rights to Water in the Murray Darling Basin – in support of the Indigenous final report to the Living Murray Initiative*, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Research Discussion Paper No.14, 2004, The Native Title Unit, AIATSIS.

institutions and regulation.<sup>4</sup> Indigenous Australians have had little to no involvement in state, territory and national consultation processes, and the development of water policy, and this has resulted in a limited capacity to negotiate enforceable water rights.<sup>5</sup>

25. With Australia being a country of physical water scarcity, the Commission is concerned about the capacity for the recognition of Indigenous rights and access to water. In the context of the predicted significant impacts of drought and climate change, securing Indigenous cultural water rights will become increasingly important.

### **5.1 Indigenous Peoples' human rights**

26. The Australian Government has ratified a number of international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention of the Elimination of all forms of Racial Discrimination (CERD). The Australian Government has an obligation to ensure the full enjoyment and exercise of these human rights for its citizens, including Indigenous peoples.

27. Indigenous peoples have a right to the equal exercise and enjoyment of their human rights. As articulated by AIATSIS:

Clean water access is critical for health in all communities. In Indigenous communities' lack of supply of clean water is linked to high morbidity and mortality rates. Unlike the broad rural demographic trends of rural to urban migrations and an ageing population, Indigenous Nations are staying on their lands and Indigenous communities have growing, young populations. Supporting these Indigenous communities is integral to the support of the socio-economic viability of rural Australia. The provision of services and infrastructure and the future development of growing Indigenous communities and Nations should be incorporated into planning objectives.<sup>6</sup>

28. In addition, as Indigenous peoples, the Murray-Darling River Indigenous Nations hold a special status as the first peoples of the lands and waters. As such, they must be afforded a number of distinct rights that recognise their rights to; their lands, waters, and natural resources; self determination; and engagement and participation in government processes that directly or indirectly impact on their lives.

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<sup>4</sup> S Jackson, (CSIRO), *Indigenous Interests and the National Water Initiative Water Management, Reform and Implementation Background Paper and Literature Review*, (2007), pp 65-6. At [http://www.nailsma.org.au/nailsma/publications/downloads/NAILSMA\\_NWI\\_Review\\_UPDATEDec07.pdf](http://www.nailsma.org.au/nailsma/publications/downloads/NAILSMA_NWI_Review_UPDATEDec07.pdf) (viewed 26 July 2008).

<sup>5</sup> M Durette, *Indigenous Legal Rights to Freshwater: Australia in the International Context*, (2008) Centre for Aboriginal Economic Policy Research Working Paper No. 42/2008, p vii. At <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP42.pdf> (viewed 28 August 2008).

<sup>6</sup> M Morgan, L Strelein, J Weir, *Indigenous Rights to Water in the Murray Darling Basin – in support of the Indigenous final report to the Living Murray Initiative*, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Research Discussion Paper No.14, 2004, The Native Title Unit, AIATSIS.

29. The following internationally recognised rights are particularly relevant to the Indigenous Nations of the Murray-Darling Basin:

(a) The right to water

The right to water is a human right that is protected in a wide range of international instruments, including the ICESCR, ICCPR and the Declaration on the Rights of Indigenous Peoples.<sup>7</sup> The ICESCR provides an implicit right to water, recognising that it contributes to achieving an adequate standard of living and the right to enjoyment of the highest attainable standard of physical and mental health. The ICESCR and the ICCPR also recognises people's right to freely dispose of their own natural resources where in no case can 'a people be deprived of its own means of subsistence.'

'The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.'<sup>8</sup> There is a fundamental link between accessing water and living in dignity which means that the human right to water is receiving increased attention and recognition both in Australia and worldwide.<sup>9</sup> The right to water is linked to many other rights including the right to food, the right to health and the right to take part in cultural life.<sup>10</sup>

The Declaration on the Rights of Indigenous Peoples further supports Indigenous people's rights to access, conservation and economic development of water. It provides that Indigenous peoples have a right to maintain and strengthen the distinctive Indigenous spiritual relationship with 'traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas.' It also provides that Indigenous peoples have the right to conservation and protection of Indigenous lands and resources with state assistance and the right to development for all Indigenous lands and resources including water. Allocations of water for cultural purposes (cultural flows) to the Indigenous Nations of the Murray-Darling River Basin will be integral to fully realise their rights to water.

(b) The right to a healthy environment

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<sup>7</sup> Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At <http://www.unhchr.ch/html/menu2/6/water/index.htm>, (viewed 3 October 2008).

<sup>8</sup> Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002). At: <http://daccessdds.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement> (viewed 9 October 2008). See also Substantive Issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights General Comment No. 14 (2000). The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights). At [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument) (viewed 9 October 2008).

<sup>9</sup> Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At <http://www.unhchr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008). See also J Gray and J Nolan, Editorial, (2008) *Human Rights Defender*, 17 (1) 1, p 1.

<sup>10</sup> Office of the United Nations High Commissioner for Human Rights, *Right to Water*. At <http://www.unhchr.ch/html/menu2/6/water/index.htm> (viewed 3 October 2008).



Environmental rights include the rights of access to the unspoiled natural resources that enable survival such as land, shelter, food, water and air; the right to refuse development; and specific environment-related rights of Indigenous peoples.

Environmental rights are provided for by international instruments including the Convention on Wetlands of International Importance especially as Waterfowl Habitat (RAMSAR Convention), the Convention on Biological Diversity, the Rio Declaration and Agenda 21.

The Rio Declaration recognises the vital role of Indigenous communities' knowledge and traditional practices in environmental management.

Agenda 21<sup>11</sup> is a comprehensive plan of action to be taken globally, nationally and locally by organisations of the United Nations, governments, and major groups in every area where there are human impacts on the environment. It provides for the protection and management of freshwater resources recognising the effects that climate change will have on water and Indigenous peoples.<sup>12</sup> Agenda 21 identifies the need to engage Indigenous people in water management policy-making and decision-making; improve Indigenous technologies to fully utilise limited water resources and to safeguard those resources against pollution; recognise the interconnection between economic development and access and supply of water.<sup>13</sup>

The Ramsar Convention provides for the conservation and wise use of all wetlands and their resources 'through local, regional and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world.'<sup>14</sup> Australia currently has 64 Ramsar sites, with some of these located on the Murray-Darling River Basin. The Convention provides guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands focusing on the need for Indigenous engagement and participation, trust and capacity building, knowledge exchange, flexibility and continuity.<sup>15</sup>

The Convention on Biological Diversity's objective is to sustain all life on earth, including aquatic ecosystems, with the global goal to reverse and stop the loss of biodiversity. The Convention is directly linked with the

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<sup>11</sup> *Agenda 21* was adopted by more than 178 Governments, including Australia, at the UN Conference on Environment and Development in 1992. At <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>, (viewed 4 November 2008).

<sup>12</sup> *Agenda 21*, Chapters 18 and 26. Chapter 26 specifically relates to recognising and strengthening the role of Indigenous People and their Communities. At <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>, (viewed 4 November 2008).

<sup>13</sup> *Agenda 21*, Chapter 18. At <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>, (viewed 4 November 2008).

<sup>14</sup> Convention of the Parties 2002, *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, Ramsar, 1971. At [www.ramsar.org](http://www.ramsar.org) (viewed 3 October 2008).

<sup>15</sup> Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands, adopted as an annex to Resolution VII.8 (1999). At [http://www.ramsar.org/key\\_guide\\_indigenous.htm](http://www.ramsar.org/key_guide_indigenous.htm) (viewed 3 October 2008).

Ramsar Convention through the Conference of the Parties (COP) decisions as the two conventions overlap in dealing with similar subject matter. The Convention on Biological Diversity provides for the respect, preservation and maintenance of knowledge, innovations and practices of Indigenous and local communities relevant for the conservation and sustainable use of biological diversity. Many of the decisions of the COP call for the full and effective participation of Indigenous communities in order to achieve the global goal.

(c) A right to economic development

The ICESCR and the Declaration on the Rights of Indigenous Peoples provide for Indigenous peoples to access and use their lands, waters and natural resources for economic development and building sustainable communities.

30. At the domestic level, Indigenous peoples' rights require legislative protection. In the development of legislative frameworks such as those relevant to land, water, and natural and cultural heritage, the following must be protected:

- (a) the full participation and engagement of Indigenous peoples in the development of policy and legislation that directly or indirectly affects their lives and their rights
- (b) the adoption of and compliance with the principle of free, prior and informed consent
- (c) the protection of Indigenous interests, specifically access to our lands, waters and natural resources
- (d) the protection of Indigenous areas of significance, biodiversity, and cultural heritage
- (e) the protection of Indigenous knowledge's
- (f) access and benefit-sharing through partnerships between the government, private sector, and Indigenous communities
- (g) non-discrimination and substantive equality.

31. Additionally, while the Bill creates a certain degree of consistency through the referral of powers of the States to the Commonwealth, the Commission is concerned about the impact of the Bill on the capacity for Indigenous peoples to fully exercise and enjoy their rights to their lands and waters obtained through the *Native Title Act 1993* (Cth), and the various state land rights and cultural heritage regimes.

32. The Commission notes that the proposed Part 11A, addresses the interplay between the *Water Act 2007* and State laws.<sup>16</sup>
33. The Commission notes that the *Water Act 2007* does not affect the operation of the *Native Title Act 1993*.<sup>17</sup>
34. However, the Commission is concerned that some amendments included in the *Water Amendment Bill 2008* may limit the rights of the Indigenous Nations of the Murray-Darling River Basin and that further amendments may be required to strengthen the ability of Indigenous peoples to protect their rights to their lands, waters, and natural resources within the Murray-Darling River Basin region.
35. This must be assured through effective and guaranteed Indigenous representation on the relevant Committee's of the Authority, and that the rights and interests of the Murray-Darling River Indigenous Nations to their lands, waters and natural resources are adequately protected under this legislation.
36. The Commission recommends that the Government fully recognise the significance of the Murray-Darling River Basin to the Indigenous Nations whose lands lie within the Basin, and that they take this opportunity to incorporate their distinct rights to water, the environment, economic development and participation and engagement into the *Water Act 2007*.
37. The Commission's particular concerns are addressed below.

## **6 Submission in relation to Schedule 1 – Amendments based on referrals of power**

38. The Commission supports the referral of powers to the Commonwealth by the referring States and the ACT as this will increase the ability for water resources in the Murray –Darling River Basin to be managed in the national interest, and the potential to optimise environmental, economic and social outcomes.
39. The Commission is optimistic that the referral of powers to the Commonwealth will result in a more consistent approach in the development and implementation of policy and strategies relevant to the Murray-Darling River Basin, and increase the capacity for Murray-Darling River Indigenous Nations to participate and engage in relevant government processes.
40. It is also encouraging to see that the Department of Climate Change and Water is working collaboratively with the Department of the Environment, Water, Heritage and the Arts to support governance and water resource management reforms aimed at improving water information, sustainable rural water use and infrastructure programs, and purchasing water to improve the

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<sup>16</sup> Item 45 repeals Division 2, Part 1 of the *Water Act 2007*. The substance of this Division is now provided for in Part 11A. See The Parliament of the Commonwealth of Australia, *Water Amendment Bill 2008, Explanatory Memorandum*, House of Representatives, 2008 p 26.

<sup>17</sup> *The Water Act 2007*, s13.

health of the river and wetlands in the Murray-Darling River Basin. As identified by the Minister for Climate Change and Water, the Honorable Penny Wong:

This Bill is about building a viable future for the Murray-Darling Basin in the face of climate change...For the first time an agreement to manage the Murray-Darling Basin in the national interest: for the first time to reflect the fact that the Murray-Darling runs across borders and needs to be managed in the national interest. So this Bill is about building a viable, long-term future for the Murray-Darling in the face of climate change.

41. However, the Commission is concerned that the current Indigenous policy platform remains isolated, disconnected and disjointed. If there is to be real change in Indigenous peoples lives, governments must work collaboratively and develop policy that deals with Indigenous disadvantage from a holistic perspective. This includes ensuring Indigenous participation and engagement in governance and water management reform processes and strategies to improve the health of the river and wetlands in the Murray-Darling River Basin, as well as mitigating the impacts of climate change on the Basin.

## **6.1 Functions, powers and duties of the Authority and the Basin Community Committee**

42. The Bill will give effect to a key outcome of the Reform IGA bringing the Murray-Darling Basin Authority (established by the current Act) and the Murray-Darling Basin Commission (established by the current Murray-Darling Basin Agreement) together as a single institution, to be known as the Murray-Darling Basin Authority. This enables the transfer of the current powers and functions of the Murray-Darling Basin Commission to the new Murray-Darling Basin Authority.<sup>18</sup>
43. The Commission supports this amendment on the basis that it will align processes and create consistency in approach and application of the management and protection requirements relevant to the Murray-Darling River Basin.
44. The Commission notes that proposed section 18E(3) provides additional functions, powers and duties of the Authority, namely to acquire, hold and dispose of real and personal property, to contract and to lease land provided for in section 173<sup>19</sup> of the Act which can be used to fulfil its functions and duties under Part 1A.
45. Within the Murray-Darling Basin, Indigenous peoples currently hold less than 0.2% of land, this is despite land reforms such as the *NSW Aboriginal Land Rights Act 1983* and the *Native Title Act*, designed specifically to address the

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<sup>18</sup> The Parliament of the Commonwealth of Australia, *Water Amendment Bill 2008, Explanatory Memorandum*, House of Representatives, 2008.

<sup>19</sup> s 173 (1)(a) of the *Water Act 2007*, provides that: The Authority has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions, other than the power (a) to acquire, hold and dispose of real and personal property; or (b) enter into contracts; or (c) to lease the whole or any part of the land or building for the purposes of the Authority.

dispossession of Indigenous peoples from their lands and waters. This disparity in land tenure will have a number of flow-on implications.

46. Firstly, the current disparity of Indigenous land tenure with the Murray-Darling River Basin means that it is highly likely that access to water for Indigenous peoples will be severely restricted if the government does not take proactive steps, such as those recommended in this submission, to protect that access.<sup>20</sup>
47. Secondly, there is a direct overlap between water rights and native title rights and interests. While Indigenous water rights are recognised under the National Water Initiative, and other Commonwealth and state mechanisms, many of these are contingent on positive native title determinations or land rights negotiations. However, native title will be very difficult, if not impossible to prove in the Murray-Darling region. The Victorian Government in particular has acknowledged that ‘the onerous bar set by the courts in *Yorta Yorta* of proof of the continuous existence and vitality of a pre-sovereignty normative society through to the current day is so difficult to reach’, given the history of dispossession and dispersal in the state<sup>21</sup>. The Wotjabulak Indigenous Nation has been the only group in the Basin to be successful in a determination of native title. Consequently, the nexus between native title and Indigenous water rights effectively means that water rights will not be realised.
48. The Commission is concerned that the rights of Murray-Darling Rivers Indigenous Nations that have been successful in gaining recognition of their native title, land rights and/or cultural heritage protection, will be threatened by the proposed amendments in the Bill. The amendments can conflict with the rights of Indigenous peoples to control their land, waters and natural resources. The power to acquire, hold and dispose of real and personal property could further disadvantage Indigenous peoples and their communities that rely on the Murray-Darling River Basin for the livelihoods.
49. The Commission urges the Authority, in its implementation of the legislation, to ensure that its actions are not only consistent with the procedural rights afforded to Traditional Owners by the *Native Title Act 1993* (Cth), but that the free, prior and informed consent of Indigenous peoples is obtained before decisions affecting their lands and waters are made.
50. The Commission urges the Commonwealth Government to act in good faith and ensure that Indigenous peoples rights to their lands and waters are afforded the highest consideration in activities and actions undertaken by the Government and the Murray-Darling Basin Authority.
51. In light of these issues, the Commission recommends that the power of the Authority to acquire, hold and dispose of real and personal property, to contract and to lease lands for the purposes of the Authority be with the exception of those lands secured for the benefit of Indigenous peoples and

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<sup>20</sup> Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows*, undated.

<sup>21</sup> Hulls R, Attorney-General Victoria, *Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission*, 16 September 2008.

their communities, unless it is with the free, prior and informed consent of those Indigenous peoples whose rights are being affected.

## **6.2 Membership of Authority, the Basin Community Committee, and relevant subcommittee's**

52. The Commission notes that while the functions, powers and duties of the Authority and the Basin Community Committee are considered in the Amendment Bill, the constitution of the Authority, the Basin Community Committee, and its related sub-committee's remain the same, and do not provide for mandatory Indigenous representation.

### (a) Membership of the Murray-Darling Basin Authority

Membership of the Murray-Darling Basin Authority is provided for at Part 9, Division 2, Subdivision B, of the *Water Act 2007*. Section 177 provides that the Authority's membership consists of (a) a Chair; and (b) 4 other members. These members are to be appointed by the Governor-General by written instrument<sup>22</sup>, and may only be eligible for appointment as an Authority member if they have a high level of expertise in one or more fields relevant to the Authority's functions (including water resource management, hydrology, freshwater ecology, resource economics, irrigated agriculture, public sector governance, and financial management); and not a member of the governing body of a relevant interest group.<sup>23</sup>

### (b) Membership of the Basin Community Committee<sup>24</sup>

Membership of the Basin Community Committee is provided for at Part 9, Division 3, Subdivision D, of the *Water Act 2007*. Section 202 (4) provides that the Basin Community Committee consists of a Chair and up to 16 other members as the Authority appoints from time to time under subsection 204 (1). The Basin Community Committee's membership must include: (a) at least one Authority member; and (b) at least 8 individuals who are water users or representatives of one or more water users.<sup>25</sup> Water users are defined as a person who is engaged in: irrigated agriculture; environmental water management; uses water for industrial purposes; or uses stock and domestic water.<sup>26</sup>

53. The Commission recommends that the *Water Amendment Bill 2008* amend s 178(2) of the *Water Act 2007* to provide for mandatory Indigenous membership on the Murray-Darling Basin Authority, and to s 202(5) to provide for mandatory Indigenous membership on the Basin Community Committee.

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<sup>22</sup> *Water Act 2007*, s 178 (1).

<sup>23</sup> *Water Act 2007*, s 178 (2) & (3).

<sup>24</sup> *Water Act 2007*, s 202 (2), provides that the Basin Community Committee's function is to advise the Authority about the performance of the Authorities functions, including advising about: (a) engaging the community in the preparation of each draft Basin Plan; and (b) community matters relating to the Basin water resources; and (c) matters referred to the Committee by the Authority.

<sup>25</sup> *Water Act 2007*, s 202 (5).

<sup>26</sup> *Water Act 2007*, s 202 (7).

54. Further, membership on the Authority and related Committee's must be a representative of the Murray-Darling Rivers Indigenous Nations, and the process for appointment of Authority and Committee Members must be decided upon by the peoples of the Murray-Darling River Indigenous Nations in accordance with their rights international treaties.
55. This will facilitate the engagement and participation in policies and decision-making that directly or indirectly affects the lives of Indigenous peoples and their ability to exercise and enjoy their human rights.
56. Section 202 (3) of the *Water Act 2007* provides the Basin Community Committee must establish (a) an irrigation subcommittee; and (b) and environmental water subcommittee; and may establish other subcommittees.
57. In order to give full recognition to the rights of Indigenous peoples to access and benefit from their lands and waters, the Commission recommends that the *Water Amendment Bill 2008* amend s 202(3) of the *Water Act 2007*, to provide that the Basin Community Committee must also establish an Indigenous water subcommittee.
58. The importance of adequate Indigenous representation is further highlighted by the proposed s86C of the *Water Amendment Bill 2008*, which provides for additional matters relating to monitoring, assessment and risk management considered in the Basin Plan.
59. The full participation and engagement of the Murray-Darling Rivers Indigenous Nations is essential to ensuring that areas of significance and the interests of the Murray-Darling Rivers Indigenous Nations are adequately protected, and that management and risk aversion strategies are developed in coordination with the relevant Indigenous peoples. This is particularly important where climate change will increasingly impact on the health of the river, and the rights of Indigenous peoples.

### **6.3 *Managing water access rights etc. for the Living Murray Initiative***

60. The proposed s18H of the *Water Amendment Bill 2008* requires the Authority, if so provided for under the *Living Murray Initiative*, to manage the water rights and interests held under the *Living Murray Initiative*, in accordance with, and to give effect to, the Initiative. The *Living Murray Initiative* is defined by the proposed s18H(2).<sup>27</sup>
61. The Commission notes that consultations were conducted by the Murray-Darling Basin Commission with the Murray-Darling Rivers Indigenous Nations to report to the Ministerial Council on community engagement. The Murray –

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<sup>27</sup> The *Living Murray Initiative*, is the Intergovernmental Agreement on Addressing Water Over-allocation and Achieving Environment Objectives in the Murray-Darling Basin of 25 June 2004 read together with: (a) the Supplementary Intergovernmental Agreement on Addressing Water Over-allocation and Achieving Environmental Objectives in the Murray-Darling Basin of 14 July 2006; and (b) arrangements referred to in clause 3.9.2 of the Agreement on Murray-Darling Basin Reform-Referral, as defined in the *Water Amendment Bill 2008*, s18H(2).

Darling Basin Commission, commissioned the *Report to the Murray-Darling Basin Commission – Indigenous Response to the Living Murray Initiative*<sup>28</sup> to detail Indigenous responses to issues concerning the communities knowledge, values, aspirations, issues information needs and concerns in relation to the vision of the Ministerial Council related to the Murray-Darling River Basin.

62. The Commission recommends this report be considered by the Senate Committee and the Government to inform the current *Water Amendment Bill 2008*.

#### **6.4 Critical human water needs**

63. The proposed item creates a new Part 2A, which requires the Basin Plan to include certain arrangements for meeting critical human needs as provided for in the Reform IGA.
64. The *Water Amendment Bill 2008*, defines *critical human water needs* as the needs for a minimum amount of water, that can only reasonably be provided from Basin water resources required to meet: (a) core human consumption requirements in urban and rural areas; and (b) those non-human consumption requirements that a failure to meet would cause prohibitively high social, economic, or national security costs.<sup>29</sup> The Bill identifies critical human needs as the highest priority use for communities who are dependent on Basin water resources; and to give effect to this priority in the Murray River system, conveyance water<sup>30</sup> will receive first priority from the water available in the system.<sup>31</sup>
65. The *Water Act 2007* currently provides for the mandatory consideration of the uses of Basin water resources (including by Indigenous peoples) and social, cultural, Indigenous circumstances of Basin communities dependent on the Basin water resources.<sup>32</sup>
66. The Commission is concerned that Indigenous water needs are not adequately addressed by the proposed provisions in the *Water Amendment Bill 2008* related to critical human water needs.
67. The Commission acknowledges that the legislation currently provides for the recognition of environmental water, and that the Authority must have regard to social, cultural and Indigenous issues in the Basin Plan.
68. However, the Indigenous Nations of the Murray-Darling River Nations argue that they require specific cultural water allocations, which they refer to as 'cultural flows', to meet their spiritual, cultural, social, economic and environmental management responsibilities and development aspirations.

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<sup>28</sup> Farley Consulting Group, *Report to the Murray-Darling Basin Commission – Indigenous Response to the Living Murray Initiative*, commissioned by the Murray-Darling Basin Commission, April 2003.

<sup>29</sup> *The Water Amendment Bill 2008*, s86A (2).

<sup>30</sup> *Water Amendment Bill 2008*, s86A (4). Conveyance water is defined as water in the River Murray system required to deliver water to meet critical human water needs as far downstream as Wellington in South Australia.

<sup>31</sup> *Water Amendment Bill 2008*, s86A (1).

<sup>32</sup> *Water Act 2007*, s21 (4)(v), and s22 (1)



69. The Indigenous Nations of the Murray-Darling River Basin define 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, environment, social and economic conditions of those Indigenous Nations’.<sup>33</sup>
70. The Indigenous Nations of the Murray-Darling River Basin distinguish between cultural and environmental water. They argue that:
- 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.<sup>34</sup>
71. The impacts and benefits of cultural water to Indigenous peoples include:
- (a) empowerment and social justice - water is being delivered to country by the peoples
  - (b) growing native plants
  - (c) protecting and hunting animals
  - (d) song, dance, art and ceremony
  - (e) spiritual sites
  - (f) improved cultural-economic and health outcome through the provision of food, medicines and materials for art.<sup>35</sup>
72. The Indigenous Nations of the Murray-Darling River Basin understand that the volume of water required to bring the Rivers back to a healthy state is well-known. Therefore questions of volume for cultural water need to be explored through scoping work with the Indigenous Nations, and that is negotiated using informed consent and good faith processes.<sup>36</sup>
73. The Commission recommends that s86A (2) of the *Water Amendment Bill 2008*, be expanded to recognise Indigenous cultural flows as a ‘critical human water need’.
74. Further, the Commission recommends that the *Water Amendment Bill 2008* amend s 202(7), to include the use of water for Indigenous cultural purposes in the identification of water users.

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<sup>33</sup> Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows*, undated.

<sup>34</sup> Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows*, undated.

<sup>35</sup> Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows*, undated.

<sup>36</sup> Murray Lower Darling Rivers Indigenous Nations, *Cultural Flows*, undated.