

Manifestations of Aboriginal water dispossession in Australia's Murray-Darling Basin

Submission responding to a call by the UN Special Rapporteur on Human Rights and the Environment for input to a report on "Too Dirty, Too Little, Too Much: The Global Water Crisis and Human Rights"

Joint submission from:



Dharriwaa Elders Group (DEG)

The DEG supports Aboriginal Elders to resume leadership roles in the community and develop the Walgett Aboriginal community. Walgett is in Gamilaraay Country and the area is part of the northern Murray-Darling Basin.

Contact: Wendy Spencer <info@dharriwaaeldersgroup.org.au>



Murray Lower Darling Rivers Indigenous Nations (MLDRIN)

MLDRIN is the peak representative body of Sovereign Aboriginal Nations in the southern Murray-Darling Basin.

Contact: Will Mooney <eo@mldrindrivers.org.au>



**Environmental
Defenders Office**

Environmental Defenders Office (EDO)

EDO is a community legal centre specialising in public interest environmental law. EDO represents and collaborates with several Indigenous clients in relation to freshwater issues across Australia including in the Murray-Darling Basin.

Contact: Dr Emma Carmody <emma.carmody@edo.org.au>

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T +61 8 9262 6989
E info@edo.org.au

W edo.org.au

5/263 Clarence Street, Sydney AUSTRALIA
2000

In Australia's Murray-Darling Basin (**MDB**), there are approximately 120,500 Indigenous peoples that belong to over 40 autonomous Aboriginal Nations.¹ Aboriginal Nations have unique and deep cultural, social, and environmental relationships with the rivers and floodplains of the MDB. The health of the MDB is in decline due to the ongoing over-extraction of water (predominantly for irrigated agriculture)² and climate change, with some catchments and wetlands facing ecosystem collapse.³ This decline has had a particular impact on Indigenous peoples, who have experienced multiple waves of water dispossession since colonisation by the British in 1788.

This dispossession has culminated in water markets in the MDB (currently valued at a minimum of \$22 to \$26 billion)⁴ reducing Aboriginal ownership of available water to virtually nothing. Specifically, a recent peer-reviewed article by a team of respected researchers found that in the New South Wales (**NSW**) component of the MDB, Aboriginal peoples own a mere 0.2% of available water, despite comprising almost 10% of the population.⁵ The authors further concluded that this figure would likely diminish under current laws and policies.⁶

The case studies in this submission represent two manifestations of Aboriginal water dispossession in the MDB and likely, associated infringements of human and Indigenous rights. These include, *inter alia*, the right to self-determination; the right to physical and mental health; the right to life; the right to take part in cultural life; the right to free, prior and informed consent; and, the right to own, use and control traditional lands and waters.⁷ They also highlight the extent to which Aboriginal rights, values and interests are marginalised under legal instruments governing the management and sharing of water in the MDB, and the failure by the Australian Government, corporate irrigators and investors in water markets⁸ to take any meaningful action to reverse this injustice.

CASE STUDY: Dharriwaa Elders Group (DEG) – water scarcity and salinity in Walgett

The DEG supports Aboriginal Elders to resume leadership roles in the community and develop the Walgett Aboriginal community. All full members of the DEG are Aboriginal people over 60 who live in Walgett, a small town in north-western NSW (which forms part of the northern MDB). Walgett is in

¹ Lana Hartwig and Sue Jackson, *The status of Aboriginal water holdings in the Murray-Darling Basin*, ARI Report No. 2020/004 (September 2020) iv (in press).

² Quentin Grafton, 'While towns run dry, cotton extracts 5 Sydney Harbours' worth of Murray Darling water a year. It's time to reset the balance', *The Conversation* (14 April 2020) <<https://theconversation.com/while-towns-run-dry-cotton-extracts-5-sydney-harbours-worth-of-murray-darling-water-a-year-its-time-to-reset-the-balance-133342>>.

³ Australian Academy of Science, *Investigation of the causes of mass fish kills in the Menindee Region NSW over the summer of 2018-2019* (2019) <<https://www.science.org.au/supporting-science/science-policy-and-sector-analysis/reports-and-publications/fish-kills-report>>; Fran Sheldon, *Technical review of the water sharing plan for the Barwon-Darling unregulated and alluvial water sources 2012, advice to the Natural Resources Commission* (2019) available at: <<https://www.nrc.nsw.gov.au/publications>>; Richard Kingsford et al, 'A Ramsar wetland in crisis - the Coorong, Lower Lakes and Murray Mouth, Australia' (2011) 62(3) *Marine and Freshwater Research* 255.

⁴ This valuation is for the Southern MDB. See: Aither, *Water Markets Report: 2019-20 Review and 2020-21 Outlook*, <<https://www.aither.com.au/report>>; Australian Competition and Consumer Commission (**ACCC**), *Murray-Darling Basin Water Markets Inquiry: Interim Report* (30 June 2020) <<https://www.accc.gov.au/focus-areas/inquiries-ongoing/murray-darling-basin-water-markets-inquiry/interim-report>>. Reliable data to support a valuation of water markets in the Northern MDB is not publicly available.

⁵ Lana Hartwig, Sue Jackson and Natalie Osborne, 'Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession' (2020) 99 *Land Use Policy* 104869.

⁶ Lana Hartwig, Sue Jackson and Natalie Osborne, 'Australia has an ugly legacy of denying water rights to Aboriginal people. Not much has changed', *The Conversation* (24 July 2020) <<https://theconversation.com/australia-has-an-ugly-legacy-of-denying-water-rights-to-aboriginal-people-not-much-has-changed-141743>>.

⁷ *International Covenant on Civil and Political Rights*, Arts 1, 6.1 (**ICCPR**); *International Covenant on Economic, Social and Cultural Rights*, Arts 1.1, 12, 15.1(a) (**ICESCR**); *United Nations Declaration on the Rights of Indigenous Peoples*, Arts 3, 11.2, 26) (**UNDRIP**).

⁸ Institutional investors now account for a significant percentage of trade in the Southern MDB. See ACCC, *Murray-Darling Basin Water Markets Inquiry: Interim Report*, above n 4, 131.

Gamilaraay Country.⁹ Aboriginal people make up 49.2% of the population of Walgett¹⁰ (compared to 3.3% of the overall Australian population).¹¹

The northern MDB is characterised by highly variable river systems that are vulnerable to the impacts of drought, climate change and the over-extraction of water.¹² Cotton is the dominant crop in the region, accounting for over 75% of the water consumed for irrigation.¹³ While extraction limits have been set under national laws, these do not take into account climatic data after 2009 and are considered by many independent experts to be unsustainable.¹⁴ Similarly, state laws governing drought reserves for a number of public storage dams in the region have been drafted so as to ignore inflow data after 2004 (before the two worst droughts on record) in an effort to maintain water allocations, including for irrigated agriculture.¹⁵ There is concern that these laws, which are underpinned by the commodification of water, have contributed to the disadvantage experienced by Aboriginal people in these catchments, including the DEG.

The DEG and Walgett Aboriginal community more generally are accordingly concerned about the health of the Baawan (Barwon) and Ngamaay (Namoi) Rivers (from which the town's water supply is sourced),¹⁶ and the impact of declining flows on an important food source, cultural uses and sites. They are also greatly concerned about the reliability and quality of drinking water for the community.

In January 2018, the rivers from which drinking water is sourced stopped flowing¹⁷ and input water supply was switched to 100% bore water. While this occurred during the worst drought on record, there is concern that ongoing, unsustainable levels of extraction from these rivers and sub-standard drought reserve management contributed to this outcome.¹⁸ In September 2018, DEG coordinated a visit by a group of water engineering academics from the University of NSW (**UNSW**) and asked that they undertake informal water testing.¹⁹ The UNSW Global Water Institute academics commented on the high sodium level. DEG later obtained test results from the Walgett Shire Council (the local government body) which showed that in May 2018 there had been similarly high sodium results (that is, around 300mg sodium/litre).²⁰

DEG then sought an opinion from Professor Jacqui Webster, who is the Director of the World Health Organization Collaborating Centre on Salt Reduction.²¹ Professor Webster's opinion (from November 2018) included that:

The sodium levels in the Walgett water supplies are concerning. 300mg/L is much higher than the Australian Drinking Water guideline of 180mg/L - and this guideline is based on palatability, not

⁹ Dharrriwaa Elders Group (**DEG**), *Submission to Inquiry into Rationale For, and Impacts of, New Dams and Other Water Infrastructure in NSW* (September 2020) 2

<<https://www.parliament.nsw.gov.au/lcdocs/submissions/69264/0112%20Dharrriwaa%20Elders%20Group.pdf>>.

¹⁰ Australian Government, Australian Bureau of Statistics (**ABS**), *2016 Census QuickStats: Walgett* <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/UCL115144?opendocument>.

¹¹ Australian Government, ABS, *Estimates of Aboriginal and Torres Strait Islander Australians* (June 2016)

<<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release>>.

¹² See for example: references at above n 3.

¹³ Sarah Ann Wheeler and Dustin Garrick, 'A tale of two water markets in Australia: Lessons for understanding participation in formal water markets' (2020) 36(1) *Oxford Review of Economic Policy* 132–153.

¹⁴ See for example: Jamie Pittock, John Williams and Quentin Grafton, 'The Murray-Darling Basin Plan fails to deal adequately with climate change' (2015) 42(6) *Water* 26-30.

¹⁵ Emma Carmody, 'Are our water laws climate ready?', 10th Annual Legalwise Water Symposium (18 October 2020).

¹⁶ Walgett Shire Council, *Water and Sewerage* <<https://www.walgett.nsw.gov.au/environment/water-and-sewerage/>>.

¹⁷ Water NSW, *Continuous water monitoring network* <<https://realtimedata.watarnsw.com.au>>.

¹⁸ Quentin Grafton, above n 2.

¹⁹ DEG, *Yuwaya Ngarrali - 'Vision'* <<https://dharrriwaaeldersgroup.org.au/index.php/yuwayangarrali>>.

²⁰ DEG has copies of these results.

²¹ George Institute of Global Health, *Professor Jacqui Webster* <<https://www.georgeinstitute.org/people/jacqui-webster>>.

health. No health-based guideline value is proposed for sodium. However, the guideline does state that: “Medical practitioners treating people with severe hypertension or congestive heart failure should be aware if the sodium concentration in the patient’s drinking water exceeds 20mg/L”. The sodium content of the Walgett tap water is 15 times this amount.

If this is the community’s main source of water or they are drinking it for prolonged periods of time, it could be a health risk in one of two ways. Firstly, people who consume adequate amounts of water would be ingesting a substantial amount of salt from this source – 2L of water containing 300mg/L sodium equates to 1.5g of salt per day which is a considerable proportion of the WHO 5g per day recommended amount for salt from food and drinks. Lack of availability of fresh foods in the community also means that people are eating large amounts of salty tinned and packaged foods, resulting in higher salt intake. High salt intake can lead to a number of adverse health outcomes but most notably high blood pressure which in turn is one of the biggest contributors to premature death from heart disease and stroke...**Aboriginal communities suffer disproportionately high rates of heart disease, stroke, diabetes and kidney disease and poor diets are the key risk factor that needs to be addressed** (our emphasis).²²

Since November 2018, the DEG and Walgett Aboriginal Medical Service (**WAMS**) have been advocating for a desalination solution. A reverse osmosis system was installed in late May 2020 after advocacy from DEG and WAMS. Water test results conducted after installation demonstrated that sodium levels had been cut by half. However, the reverse osmosis system was discontinued by September 2020. Following this, Walgett was again being supplied 100% bore water for its drinking water and this continued until early November (when it was switched over to river water). High sodium levels continued to be present.

Of related concern is the loss – due to water restrictions – of the WAMS community garden, which provided fruit and vegetables to chronic disease patients and Elders. In a community where the cost of food is high, fresh food is at a premium and local health services are overwhelmed by cases of obesity and other conditions that require improved nutrition, the impact of this loss cannot be overstated.

In summary, the DEG is concerned that applicable laws are reinforcing Aboriginal water dispossession, including by permitting unsustainable levels of extraction from the Baawan and Ngamaay Rivers in a changing climate. This has contributed to the community’s reliance on highly saline bore water, which is likely exacerbating the impacts of chronic diseases present in the local Aboriginal community. Relevantly, the failure to provide a quality of drinking water that the community is prepared to drink, is inconsistent with a number of established human rights, of which the right to water is derivative.²³

Urgent action is therefore required to:

- reduce the volume of water that is being extracted from rivers in the region to improve their health and capacity to support important sources of food, cultural uses and provide safe drinking water;
- water entitlements must be reallocated to Aboriginal people so that they can determine and develop priorities and strategies for the development and use of their waters;²⁴
- introduce desalination solutions for towns relying on groundwater; and
- ensure potable water is supplied to Aboriginal communities.

²² DEG, *Statement* (30 November 2018)

<<http://www.dharriwaaeldersgroup.org.au/images/downloads/FinalDEGSaltWaterStatement30November2018.pdf>>.

²³ Notably: ICESCR, Art 11 (the right to an adequate standard of living) and Art 12 (the right to the highest attainable standard of health); and, ICCPR, Art 6 (the right to life).

²⁴ UNDRIP, Art 32.1.

CASE STUDY: Murray Lower Darling Rivers Indigenous Nations (MLDRIN) – water infrastructure projects destroying Aboriginal cultural heritage

MLDRIN is the peak representative body of Sovereign Aboriginal Nations in the southern MDB. The group currently includes delegates from 24 Aboriginal Nations across the states of Victoria, NSW and South Australia. This case study will focus on the impact of water-related infrastructure projects in the southern MDB on Aboriginal cultural heritage and associated human and Indigenous rights. The examples cited below are a small sample of similar projects that have been built or are proposed across the country.²⁵

By way of background, national heritage legislation and several pieces of state legislation (the main day-to-day heritage legislation in Australia) are inadequate to protect Aboriginal heritage.²⁶ In some jurisdictions, there are insufficient legislative consultation requirements meaning that legal destruction of heritage can occur without adequate consultation of Traditional Owners. The recent demolition of the 46,000-year-old Juukan Gorge rock shelters in Western Australia by Rio Tinto drew attention to the state-sanctioned primacy of mining development over Aboriginal sites, cultures and human and Indigenous rights.²⁷ However, this legal primacy is extended to many other forms of development, including dams, weir-like structures on floodplains (**‘regulators’**) and levee banks.

Regulators and associated structures have been installed by governments on several floodplains in the southern MDB as a means of delivering water directly onto these sites, thereby obviating the need for overbank flows.²⁸ At least one of these – the Koondrook-Perricoota Forest Flood Enhancement Works – destroyed Aboriginal cultural heritage, including numerous burial sites. This caused significant distress for the Traditional Owners of the Forest, namely the Yorta Yorta and Barapa Barapa Nations.²⁹

Regulators and other engineering works on floodplains and in waterways and lakes are proposed across the southern MDB under the Basin Plan, a Commonwealth law regulating water sharing and management in the MDB. MLDRIN has repeatedly and unreservedly opposed the construction of these engineering works on the basis that they will destroy Aboriginal cultural heritage across the twelve sites in question (and in the knowledge that there is no veto right under relevant cultural heritage laws).³⁰ Should these projects be approved, their impacts will compound those that have been borne by

²⁵ For example, in NSW the proposed development of the Warragamba Dam will increase flooding upstream, further damaging significant Indigenous sites of the Gundungurra peoples. See Kathleen Calderwood, ‘Water NSW argues against more environmental assessments around Warragamba Dam wall’ (*ABC News online*, 5 August 2020) <<https://www.abc.net.au/news/2020-08-05/water-nsw-amends-warragamba-dam-wall-proposal/12527164>>. In Queensland, the proposed Urannah Dam is to be constructed on the lands of the Wirri and Birri Peoples of the Birri Gaba Nation despite their opposition. It will destroy Aboriginal cultural heritage and ecosystems of significance to the Birri Gaba Nation. See: Urannah, ‘Cultural values’ <<https://urannah.com.au/cultural-values/>>. For further details, see also Environmental Defenders Office, ‘Submission to the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia’ (14 August 2020) <<https://www.edo.org.au/wp-content/uploads/2020/08/200814-EDO-Submission-Inquiry-into-Juukan-Gorge-destruction.pdf>>.

²⁶ Gerry Bates (with contributions from Justine Bell-James, Lauren Butterly, Amy McInerney and Gerry Nagtzaam), *Environmental Law in Australia* (LexisNexis, 10th Edn, 2019) Chapter 8.

²⁷ Environmental Defenders Office, above n 25.

²⁸ Murray-Darling Basin Authority, *Fact Sheet: The Living Murray Program* (November 2011) <<https://www.mdba.gov.au/sites/default/files/pubs/TLM-2009-Overview-Fact-Sheet.pdf>>.

²⁹ MLDRIN, Submission to the Murray-Darling Basin Authority regarding the Sustainable Diversion Limit Adjustment Mechanism Draft Determination, available online (as attachment to submission to NSW Water Reform Action Plan (16 April 2018) <https://www.industry.nsw.gov.au/__data/assets/pdf_file/0008/162593/Water-reform-consultation-submission-239-Murray-Lower-Darling-Rivers-Indigenous-Nations.pdf>.

³⁰ The Victorian legislation may be considered some of the most progressive legislation in Australia (in relation to Aboriginal decision-making) but even that does not have a veto right (instead it focusses on minimising harm): above n 26, see p. 547.

Aboriginal Nations in the southern MDB for over a century as a consequence of large-scale river regulation and ongoing over-extraction.³¹

In addition to the projects proposed under the Basin Plan, a number of proposals to construct new dams and to raise the walls of existing dams are being considered under various state and national laws, despite opposition by affected Aboriginal Nations.³² One of these, the proposed raising of the Wyangala Dam wall, will result in the destruction of sites that are sacred to the Wiradjuri Nation.³³ As it will change the course of the Galari Bila (Lachlan River), it will also render the knowledge of the Wiradjuri People regarding their Country obsolete.³⁴ This is tantamount to an attack on their cultural identity, which is inextricably linked to the river.

In summary, the infrastructure projects described above will, if approved, result in the deterioration of Aboriginal cultural and heritage values, including:

- damage to culturally significant places;
- the inability to maintain and teach cultural practices and knowledge;
- the erosion of cultural identity, which is intertwined with specific features of rivers (which are altered by large dams); and
- the inability to access cultural resources, including important food and fibre species.

The continued erosion of Aboriginal cultural and heritage values has a negative impact on the overall wellbeing of Aboriginal Nations. This in turn infringes the right to physical and mental health and the right to take part in cultural life.³⁵ It also infringes several articles in the *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)* including the right of Indigenous peoples to practice and revitalise their cultural traditions; to have access to education in their own culture; and to maintain and strengthen their distinctive spiritual relationship with their traditionally owned waters.³⁶ Further, the state has not met the requirement to obtain free, prior and informed consent from Indigenous peoples relating to the development, utilisation and exploitation of water resources.³⁷

To begin to reverse these infringements and the associated water dispossession the state must consult and cooperate in good faith (in accordance with Article 32.2 UNDRIP) with Indigenous peoples about water sharing such that:

- cultural heritage is protected, and Indigenous peoples are able to make decisions about their cultural heritage; and
- pursuant to their right to self-determination, Aboriginal people must be able to freely pursue their economic, social and cultural development in relation to their water resources.³⁸

³¹ MLDRIN, above n 29.

³² Above, note 25.

³³ Inland Rivers Network, Media Release: 'No need to fast-track Wyangala dam project' (02 October 2020) <<https://inlandriversnetwork.org/2020/10/03/no-reason-to-fast-track-wyangala-dam-project/>>. Co-signed with Wiradjuri representatives, Isabel Coe and George Coe.

³⁴ As communicated to the Environmental Defenders Office by a Wiradjuri Elder.

³⁵ ICESCR, Arts 12 and 15.

³⁶ UNDRIP, Arts 11, 14 and 25.

³⁷ UNDRIP, Art 32.2.

³⁸ UNDRIP, Art 3.