

**Australian Peoples' Tribunal
for Community and Nature's Rights**



2019 Citizens' Inquiry into the Health of the Barka/Darling River and Menindee Lakes

CHAPTER 8: FINDINGS AND RECOMMENDATIONS



**Michelle Maloney, Gill Boehringer, Gwynn MacCarrick,
Manav Satija, Mary Graham and Ross Williams**

Australian Peoples' Tribunal for Community and Nature's Rights

an initiative of the Australian Earth Laws Alliance

Report Editor
Michelle Maloney

© 2020 Australian Peoples' Tribunal for Community and Nature's Rights (APT)

All rights reserved. Except as permitted under the Australian Copyright Act 1968 (for example, a fair dealing for the purposes of study, research, criticism or review), no part of this report may be reproduced, stored in a retrieval system, communicated or transmitted in any form or by any means without prior written permission.

The Australian Peoples' Tribunal for Community and Nature's Rights (APT) is an initiative of the Australian Earth Laws Alliance.

All inquiries should be directed to the Australian Earth Laws Alliance (AELA).
<https://www.earthlaws.org.au>
tribunal@earthlaws.org.au

Published by:

Australian Peoples' Tribunal for Community and Nature's Rights (APT)
PO Box 405
BANYO Queensland 4014
AUSTRALIA

Layout & Cover Design/Cover Images: James K. Lee
All photos by James K. Lee unless otherwise credited

Michelle Maloney • Gill Boehringer
Gwynn MacCarrick • Manav Satija
Mary Graham • Ross Williams

2019 Citizens' Inquiry into the Health of the Barka / Darling River and Menindee Lakes

Chapter 8: Findings and Recommendations



The Australian Peoples' Tribunal for Community and Nature's Rights (APT) acknowledges that the sovereignty of the First Nations People of the continent now known as Australia was never ceded by treaty nor in any other way.

The APT acknowledges and respects First Nations Peoples' laws and ecologically sustainable custodianship of Australia over tens of thousands of years through land and sea management practices that continue today.

Table of Contents

CHAPTER 8: FINDINGS AND RECOMMENDATIONS.....	3
8.1 URGENT ACTION REQUIRED	3
8.1.1 Immediate emergency actions to restore river health	3
8.1.2 Immediate emergency actions to restore human health	4
8.2 GOVERNMENTS HAVE BREACHED RELEVANT LEGAL OBLIGATIONS.....	4
8.2.1 Legal Obligations under State and Federal Law	4
8.2.2 Specific obligations under Federal and International Law relating to the rights of First Nations Peoples	10
8.2.3 Obligations under International Treaties and Instruments to which Australia is a party... ..	11
8.3 GOVERNMENT NON-COMPLIANCE WITH EMERGING INTERNATIONAL NORMS	16
8.3.1 Ecocide.....	16
8.3.2 Rights of Nature	17
8.3.3 Genocide.....	18
8.4 ISSUES REQUIRING FURTHER INVESTIGATION	19
8.4.1 The need for a Federal Royal Commission.....	19
8.4.2 The need to investigate allegations of corruption, abuse of power and misuse of public office	21
8.4.2.1 Allegations that the NSW Government has ‘decommissioned’ the Menindee Lakes	21
8.4.2.2 Allegations that the creation and administration of water markets has been biased towards corporate private water users	22
8.5 THE NEED FOR NEW GOVERNANCE APPROACHES	24
8.5.1 The need for “life centred” river governance, led by First Nations peoples and local communities	24
8.5.2 The need for new laws that recognise the Barka/Darling River and Menindee Lakes as a holistic living system	25
8.5.3 The need to ban all extractive activities in the Barka/Darling River basin, including mining, fracking and unconventional oil and gas extraction	25
8.5.4 The need to redesign river governance systems and human economic systems, to fit within the biophysical capacity of the Barka/Darling dryland river system	25
8.6 LONG TERM RESTORATION	25
8.6.1 The need for major, long term investment in ecological restoration	25
8.6.2 The need for major, long term investment in restoration of community economies and societies	26
8.6.2 The need for regional and national ecological education about dryland river systems	26

APPENDIX – SUMMARY OF FINDINGS & RECOMMENDATIONS 27
FINDINGS OF THE INQUIRY PANEL..... 27
RECOMMENDATIONS OF THE INQUIRY PANEL 28

DRAFT

CHAPTER 8: FINDINGS AND RECOMMENDATIONS

This section of the Tribunal Report (Section 8) contains the findings and recommendations of the Tribunal Panel. This section does not contain direct quotes from Tribunal participants, but refers back to previous sections that set out community perspectives and opinions.

After considering all of the testimonies provided by local people and reviewing material relevant to their statements, the Tribunal Panel has made a number of findings. These findings and related recommendations are grouped under six categories:

- Urgent action required to restore the river system and community health
- Governments have breached relevant obligations under State, Federal and International Law
- Non-compliance with emerging international norms and standards
- Issues for further investigation
- The need for new governance approaches
- Long-term ecological restoration

8.1 URGENT ACTION REQUIRED

Throughout the Inquiry, the Panel heard substantial evidence to lead to the conclusion that immediate emergency actions to restore river health and to restore human health for community members living along the river.

8.1.1 Immediate emergency actions to restore river health

The Panel makes the following recommendations to address the urgent need to restore river health:

RECOMMENDATION 1: Basin States immediately provide *funding* for First Nations peoples and local communities along the Barka/Darling River to collaboratively design and develop an Emergency Community River Restoration Plan. The Plan should focus on ensuring healthy river flows, restoring the Menindee Lakes and guaranteeing that sufficient volumes of clean, healthy water will always remain in the Barka/Darling River during drought, as it used to in the past.

RECOMMENDATION 2: Basin States immediately fund a River Ecological Restoration Fund, that will be used to implement the Emergency Community River Restoration Plan.

RECOMMENDATION 3: Basin States take immediate action to *end water trading in Australia*, including an immediate moratorium on water trading and a transition plan to repeal relevant legislation.

RECOMMENDATION 4: Basin States place a *moratorium on the granting of any new water licences* that would allow water extraction from the Barka/Darling River catchment and headwaters until the Emergency Community River Restoration Plan is created and implemented.

RECOMMENDATION 5: Basin States impose an *immediate ban on all flood plain harvesting and introduce new laws to remove existing flood plain harvesting structures* throughout the

Barka/Darling River catchment system.

RECOMMENDATION 6: Basin States place a *moratorium on all groundwater extraction* from the Barka/Darling River catchment until the Emergency Community River Restoration Plan is created and implemented.

RECOMMENDATION 7: Basin States *ban all future large scale extraction from the Barka/Darling River system* and fund a transition plan to phase out all existing large-scale extraction from the top of the Barka/Darling River system, in accordance with the Emergency Community River Restoration Plan.

8.1.2 Immediate emergency actions to restore human health

The Panel makes the following recommendations to address the urgent need to restore human health for community members:

RECOMMENDATION 8: Basin States create and fund an Emergency Barka/Darling River Community Health Fund that will be administered in compliance with the priorities identified by affected communities.

RECOMMENDATION 9: Basin States work with affected communities, to use the Emergency Barka/Darling River Community Health Fund to pay for and organise the immediate provision of clean, safe and free potable water to all affected communities, for as long as it takes to restore the health of the river system and ensure a safe water supply for river communities.

RECOMMENDATION 10: Basin States immediately fund an investigation into motor-neurone disease and other health problems (including skin rashes and other skin problems) suspected of being caused by people having to use poor quality water in Menindee, Wilcannia and other affected communities.

RECOMMENDATION 11: the NSW government provide financing for improved health care facilities, mental, physical and dental, for the towns along the Barka/Darling River Basin within NSW.

8.2 GOVERNMENTS HAVE BREACHED RELEVANT LEGAL OBLIGATIONS

8.2.1 Legal Obligations under State and Federal Law

The Water Act 2007 (Cth)

Around the time of the Inquiry, all towns from Wentworth to Brewarrina reported that there was a “no flow” of water in the Darling River. In December 2018 and January 2019 three significant fish kill events occurred near Menindee NSW with estimates of around one million fish and higher.

The law relating to water rights in Australia can primarily be found in the Commonwealth Water Act 2007 as amended by the Water Amendment Act 2008. Amongst other things, the Water Act requires the development of a Basin Plan for the integrated management of water in the Murray-Darling Basin. The Murray-Darling Basin Plan, passed in 2012, is a legislative instrument that sits under the Water Act.

The Water Act 2007 was legislated to provide the legal basis for the control of the Murray Darling Basin resources to enable the Commonwealth, in conjunction with the Basin States, to manage the Basin water resources in the national interest (s3a)

The Commonwealth head of power is claimed under section Section 51(xxix) of the Australian Constitution which gives the Commonwealth Parliament of Australia the right to legislate with respect to "external affairs" of the Australian Constitution with regards to its international treaty obligations.

The objects of section 3 of the Water Act 2007 states;

the Commonwealth, in conjunction with the Basin States, to manage the Basin water resources in the national interest;

and to give effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources) and,

in particular, to provide for special measures, in accordance with those agreements, to address the threats to the Basin water resources; and (c) in giving effect to those agreements, to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes

The Water Act 2007 under s4 lists the relevant international Agreements and Treaties. Relevant "international agreement" include the following: (i) the *Ramsar Convention 1971* (RAMSAR); (ii) the *Biodiversity Convention* (CBD); (iii) the *Desertification Convention*; (viii) the *Climate Change Convention 1992*. These treaties are reflected in the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

Obligations under the Water Act 2007 (Cth) relating to human needs

Part 2A of the *Water Act* contains provisions related to 'critical human needs' including the following:

86A Critical human water needs to be taken into account in developing Basin Plan

(1) Without limiting section 21, the Basin Plan must be prepared having regard to the fact that the Commonwealth and the Basin States have agreed:

- (a) that critical human water needs are the highest priority water use for communities who are dependent on Basin water resources; and
- (b) in particular that, to give effect to this priority in the River Murray System, conveyance water will receive first priority from the water available in the system.

(2) **Critical human water needs** are 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.

The *Water Act* approaches the task of ensuring the Basin Plan meets critical human water needs by stipulating a risk management approach to implementing the Plan. The Basin Plan is required for example to:

- Include a statement of the amount of total water and conveyance water required in each Basin State to meet the critical human water needs of the communities in the State;¹
- Specify water quality trigger points and salinity trigger points at which water in the River Murray System becomes unsuitable for meeting critical human water needs;²
- Specify arrangements for monitoring matters relevant to critical human water needs;³
- Specify the risk management approach for inter-annual planning relating to arrangements for critical human water needs in future years.⁴
- The Plan must also address the possibility that there will be insufficient water to meet these critical needs. This includes duties to specify conditions for the commencement of Tier 2 or Tier 3 water-sharing arrangements in place of Tier 1 water-sharing arrangements among Basin States.⁵

As can be ascertained from this, the approach taken by the *Water Act* insofar as critical human needs are concerned is to mandate its consideration by decision makers and water managers acting pursuant to the Basin Plan. Critical needs are met in accordance with the arrangements contained within the Act, the Basin Plan, the MDB Agreement and the water-sharing schedule that is part of the Agreement.

The *Water Act* does provide a framework by which compliance with the various provisions of the Act can be measured, and in some circumstances, enforced. With respect to critical human needs, the *Water Act* provides two separate sets of compliance regimes:

- The MDBA Authority and other agencies of the Commonwealth must perform their functions, and exercise their powers, consistently with, and in a manner that gives effect to the matters included in Part 2A;⁶
- Other agencies and persons, including public and private sector organisations, are only required to act in a manner which is not inconsistent with the matters contained in Part 2A.⁷

The effect of this second limb is that other agencies and persons are not required to 'give effect' to the provisions in Part 2A, only to act in a manner which is not inconsistent with it. If an act was found to contravene either of these compliance mechanisms then a limited number of enforcement mechanisms are available to an applicant in Court.⁸

The *Water Act* does not provide any relevant enforcement mechanisms beyond ensuring that administrators, water managers and others act in accordance with the Basin Plan. If the Basin Plan itself was drafted ineffectively then the *Water Act* would be able to provide any further means of enforcement. The *Water Act* does not create a legally enforceable overarching personal or community right to water.

Obligations under the Water Act 2007 (Cth) relating to environmental protection

Water law expert Dr Carmody EDO has said:

¹ Water Act 2007 (Cth), ss. 86B(1)(a), 86B(1)(b).

² Water Act 2007 (Cth), s. 86B(1)(c).

³ Water Act 2007 (Cth), s. 86C(1)(a).

⁴ Water Act 2007 (Cth), s. 86C(1)(c).

⁵ Water Act 2007 (Cth), ss. 86D, 86E.

⁶ Water Act 2007 (Cth), s. 86G(1).

⁷ Water Act 2007 (Cth), s. 86H.

⁸ Water Act 2007 (Cth), ss. 140-164.

“If I were to distil the purpose of Water Act and the Basin Plan in one single element, it would be to reinstate an environmentally sustainable level of [water] take.”

The *Water Act 2007* is one of the only legislative instruments in the world that gives legislative priority to the environment above all other considerations. The Water Act goes on to spell out the underlying principles of sustainability. Specifically, s.3A Principles of ecologically sustainable development states that ecologically sustainable administration of water resources is:

- (a) decision-making processes should effectively integrate both long-term and short-term **economic, environmental, social** and equitable considerations;
- (b) if there are **threats of serious or irreversible environmental damage**, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the **benefit of future generations**;
- (d) the conservation of **biological diversity and ecological integrity** should be a fundamental consideration in decision-making;

The Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)

The EPBC Act is the Australian Government’s central piece of environmental legislation. It provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places.

The Objects of the EPBC Act

- (1) The objects of the EPBC Act are:
 - (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
 - (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
 - (c) to promote the conservation of biodiversity; and
 - (ca) to provide for the protection and conservation of heritage; and
 - (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
 - (e) to assist in the co-operative implementation of Australia’s international environmental responsibilities; and
 - (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity; and
 - (g) to promote the use of indigenous peoples’ knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.
- (2) In order to achieve its objects, the Act:
 - (a) recognises an appropriate role for the Commonwealth in relation to the environment by focussing Commonwealth involvement on matters of national environmental significance and on Commonwealth actions and Commonwealth areas; and

- (b) strengthens intergovernmental co-operation, and minimises duplication, through bilateral agreements; and
- (c) provides for the intergovernmental accreditation of environmental assessment and approval processes; and
- (d) adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed; and
- (e) enhances Australia's capacity to ensure the conservation of its biodiversity by including provisions to:
 - (i) **protect native species** (and in particular prevent the extinction, and promote the recovery, of threatened species) and ensure the conservation of migratory species; and
 - (iii) **protect ecosystems** by means that include the establishment and management of reserves, the recognition and protection of ecological communities and the promotion of off-reserve conservation measures; and
 - (iv) identify processes that threaten all **levels of biodiversity** and implement plans to address these processes; and
- (f) includes provisions to enhance the protection, conservation and presentation of world heritage properties and the conservation and wise use of **Ramsar wetlands of international importance**; and
 - (fa) includes provisions to identify places for inclusion in the National Heritage List and Commonwealth Heritage List and to enhance the protection, conservation and presentation of those places; and
- (g) promotes a partnership approach to environmental protection and biodiversity conservation through:
 - (i) bilateral agreements with States and Territories; and
 - (ii) conservation agreements with land-holders; and
 - (iii) **recognising and promoting indigenous peoples' role** in, and knowledge of, the conservation and ecologically sustainable use of biodiversity; and
 - (iv) the **involvement of the community** in management planning.

ANALYSIS:

With no flow in the river between Brewarrina and Wentworth NSW, the Federal government has prevented native species accessing a known drinking water supply, endangering already threatened species in that region. The fish kills at Menindee estimated at over million fish in December 2018 included endangered fish species. The Tribunal has not heard any evidence presented that the government has tried to mitigate the effects of no flow on either the flora or fauna along the entire Darling for endangered species survival. What water that was found in pools along the river, were considered toxic to both animal and human health and deemed undrinkable.

The processes of flood plain harvesting and the nature of the reduced flow for the Darling brought up issues involving biodiversity affected by flood plain harvesting. The Inquiry felt that the use of flood plain harvesting would be potentially detrimental to biodiversity and affect threatened species in those areas.

Evidence provided of the extent of cotton farming along the upper Darling Barwon regions raises concerns of Citizens Inquiry as to the biodiversity of land affected by native vegetation clearance and the introduction of cotton as a monoculture.

The Federal Government under the RAMSAR convention is to protect its native wetlands of international importance[58]. There are sixteen of these wetlands, covering 638ha hectares, are

located within the Murray Darling Basin (MDB). The designation of Ramsar sites carry specific responsibilities, one of these being to manage the sites in a way that would maintain their ecological character and promote their conservation values and wise use. [59]

With no flow going down the Darling any wetlands would be impacted by the no flow. Evidence was given at Walgett that an important wetland (Narran Lake Nature Reserve) [60] just outside of the town had dried out and described by a participant as a “dust bowl” and subsequently the birds had died or moved away.

The Inquiry did not have sufficient time to determine what endangered native species have been adversely affected by the no flow, but it could be assumed safely that all animals, birds and fish that had once depended on the flow of the river for water were now unable to access the river or were unable to drink its water because of the toxic nature. Evidence was given of animals “dropping dead in front of my eyes” at the side of the river, painted a toxic picture of the state of the Darling’s water.

Narran Lake Nature Reserve in north-west New South Wales were first listed under the Ramsar Convention in 1999, with a further area added in 2016.⁹. The site was extended to capture more breeding and feeding habitat for waterbirds. It now covers a total area of 8447 hectares and comprises the whole floodplain area within Narran Lake Nature[61]

FINDING 1: The *Water Act 2007* imposes an implied duty on administrators, governments and water managements to ensure that water management under the Basin Plan is undertaken in a way which ensures that critical human needs are met. Despite this, the *Water Act 2007*:

- fails to provide any effective enforcement mechanisms to ensure compliance with this duty; and
- fails to provide any remedies or recourse to persons whose critical human needs are not met under the Basin Plan.

FINDING 2: The Australian Government has failed to protect the ecological values and ecosystem services of the Murray-Darling Basin, taking into account, in particular, the impact that the taking of water has on the watercourses, lakes, wetlands, ground water and water-dependent ecosystems that are part of the Basin water resources and on associated biodiversity as per the provisions (section (d)(ii) Objects) of the *Water Act 2007*.

FINDING 3: The Australian Government has failed to return the river to sustainable water or recover adequate environmental water sufficient to restore protected wetlands, water dependant ecosystems or endangered species populations.

⁹ The Ramsar site within the Narran Lake Nature Reserve is about 50 kilometres east of Brewarrina in north-west NSW. One section of the site was listed under the Ramsar Convention in 1999, and a further 3104 hectares were added in 2016

RECOMMENDATIONS:

RECOMMENDATION 12: The Water Regulations 2008 (Cth) be amended to list the International Covenant on Economic, Social and Cultural Rights as a “relevant international agreement” for the purposes of s. 4 of the Water Act 2007 (Cth)

RECOMMENDATION 13: The Water Act 2007 (Cth) be amended to create enforceable personal rights with respect to ‘critical human water needs’

RECOMMENDATION 14: The Water Act 2007 (Cth), s. 86(H) be amended to create compliance mechanisms for other agencies and persons in relation to a breach of ‘critical human water needs’

8.2.2 Specific obligations under Federal and International Law relating to the rights of First Nations Peoples

While the Water Act 2007 does not include any specific legislation involving First Nation people, both under the Native Title Act 1993 (see also Rights of Indigenous Peoples UN Declaration) and the Environment Protection and Biodiversity Conservation Act 1999, recognising and promoting indigenous peoples’ role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or DOTROIP delineates and defines the individual and collective rights of Indigenous peoples, including their ownership rights to cultural and ceremonial expression, identity, language, employment, health, education and other issues. It "emphasizes the rights of Indigenous peoples to maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations". It "prohibits discrimination against indigenous peoples", and it "promotes their full and effective participation in all matters that concern them and their right to remain distinct and to pursue their own visions of economic and social development" Australia recognised these rights as being recognised International law in 2009. [63]

While the UN Declaration is not a convention its content is well reflected in the Native Title Act 1993. The main objects of the *Native Title Act* are among others: to provide for the recognition and protection of native title. Under 223 of the Native Title Act, the expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

1. the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
2. the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.
Hunting, gathering and fishing covered

- (2) Without limiting subsection (1), rights and interests in that subsection includes hunting, gathering, or fishing, rights and interests.

Other interests under section 2 includes water rights.

ANALYSIS:

First Nations communities told the Inquiry that they are unable to access any flow for drinking purposes. All of the river as observed by both the Members of the Citizens Inquiry and the local First Nation people have stated that the water (north of Wentworth NSW) is both unfit to drink where available or at the very least unsafe to drink because of its contamination with blue green algae. Most First Nations peoples we heard from reported having to buy drinking water.

First Nations communities also told the Inquiry that they are unable to access their traditional food sources. They told us that there was a scarcity of fish available to consume and that the toxic nature of the water made the fish, freshwater mussels and yabbies inedible.

First Nations communities told the inquiry that they saw the Barka River as their “mother” and they experienced the lack of healthy flow in the river as the “death of their mother”. This significantly impacted their ability to spiritually connect with the land and to engage in their traditional cultural practices. Some First Nations communities reported that they are unable to teach their children about their cultural practices as many children under the age of four have never seen the river flow. We were told that cultural practices also include the traditional seasonal hunt for emu eggs which is dependent on high water volumes and flooding and have inevitable been affected by the lack of flow in the River.

FINDINGS:

FINDING 4: The Australian Government has breached its obligation under the Native Title Act to provide adequate water resources for drinking purposes to First Nation communities.

FINDING 5: The Australian Government has breached its obligation under the Native Title Act to ensure that First Nations communities are able to access their traditional food sources.

FINDING 6: The Australian Government has breached its obligation under the Native Title Act to ensure that First Nations communities are able to engage in their traditional cultural practices.

8.2.3 Obligations under International Treaties and Instruments to which Australia is a party

Australia has certain international law obligations with respect to the human rights of people within Australian jurisdiction. These obligations arise as a consequence of Australia being a signatory to particular international human rights law instruments.

Some of the human rights instruments to which Australia is a party impose particular obligations with respect to water rights:

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Australia has been a signatory to CEDAW since 1980 and ratified the convention in 1983. Under CEDAW, Australia is required to take all appropriate measures to ensure to that women, especially

women in rural areas, enjoy the right to adequate living conditions, particularly in relation to water supply.¹⁰

Australia has also signed and ratified the Optional Protocol to CEDAW which provides a pathway by which an Australian applicant may apply to the relevant UN treaty body (the Committee on the Elimination of All Forms of Discrimination Against Women) alleging a breach of these relevant provisions of CEDAW.¹¹

Convention on the Rights of the Child (CRC)

Australia signed and ratified CRC in 1990. Under Article 24 of CRC, Australia recognises the right of children in its jurisdiction to the enjoyment of the highest attainable standard of health. This includes the obligation to take appropriate measures to combat disease and malnutrition through the provision of clean drinking-water.¹²

While an Optional Protocol providing a communications procedure in respect to alleged breaches of CRC has now come into force,¹³ Australia has as yet neither signed nor ratified the optional protocol and as such, alleged breaches of these relevant provisions of the CRC cannot be referred to the relevant oversight.

International Covenant on Civil and Political Rights (ICCPR)

Article 27 of ICCPR requires that:

In those States in which ethnic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of the group, to enjoy their own culture, to practice their own religion, or to use their own language.

The effect of this provision has been by the relevant treaty-monitoring body, the Human Rights Committee, who has said in respect to Article 27:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure effective participation of members of minority communities in decisions which affect them.¹⁴

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Australia has been a signatory to ICESCR since 1972 and ratified the instrument in 1975. ICESCR does not itself specifically provide for a human right to water, however does impose other relevant obligations on Australia. Article 11 imposes obligations on Australia to ensure the right to an

¹⁰ *Convention on the Elimination of All Forms of Discrimination Against Women*, Article 14(2)(h)

¹¹ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, entered into force 22 December 2000.

¹² *Convention on the Rights of the Child*, Article 24(2)(c)

¹³ *Optional Protocol to the Convention on the Rights of the Child*, entered into force 14 April 2014.

¹⁴ Human Rights Committee 'General Comment 23: The rights of minorities (Art. 27)' (April 1994) CCPR/C/21/Rev.1/Add.5, at 7.

adequate standard of living for people in Australia. Article 12 imposes obligations to ensure the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

These two provisions have been interpreted by the UN Committee responsible for defining the scope and application of ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR), as giving rise to a right to water. In its General Comment 15, CESCR interprets an adequate standard of living and highest attainable standard of health to include the right to water. The Committee goes on to define the normative content of these water rights as including both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.

CESCR also notes that Articles 11 and 12 contain an aspect of 'adequateness' both with respect to standard of living and standard of health. In providing the measure of 'adequateness' to the right to water, CESCR provides that there are particular minimum prerequisites which must be met:

- *Availability*: the water supply for each person must be sufficient and continuous for personal and domestic uses, including for drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.
- *Quality*: the water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use.
- *Accessibility*: water must be physically and economically accessible without discrimination. CESCR provides that the accessibility factor includes the to seek, receive and impart information concerning water issues.

As the human right to water is seen as derivative from the right to life, the focus of the right is upon an adequate quantity and quality of water to sustain human life. CESCR notes that water should be treated as a social and cultural good rather than primarily as an economic good. As is common to the interpretation of international human rights instruments, the obligations imposed by such a right includes the obligation to protect, respect and fulfil the right to water.

Article 15 of ICESCR provides a right of everyone within a State's jurisdiction to take part in cultural life. The Committee on Economic Social and Cultural Rights has identified Indigenous peoples as a category of persons requiring special protection, and has mandated that State Parties to take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.¹⁵ The rationale provided for this is:

The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent

¹⁵ Committee on Economic, Social and Cultural Rights 'General Comment 21: Right of everyone to take part in cultural life (art. 15, para 1(a)' (21 December 2009) E/C.12/GC/21, at 36.

the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.¹⁶

While an Optional Protocol providing a communications procedure in respect to alleged breaches of ICESCR has now come into force,¹⁷ Australia has as yet neither signed nor ratified the optional protocol and as such, alleged breaches of these relevant provisions of the CRC cannot be referred to the relevant oversight.

ANALYSIS:

Australia's international obligations do not automatically become enforceable domestic law when Australia signs and ratifies an international treaty. In order to give effect to these international obligations domestically, Australia would be required to legislate in the Australian Parliament to implement these international standards into domestic law. Notwithstanding this, it is an established principle of Australian law that by signing and ratifying an International instrument, Australia creates a legitimate expectation that it will abide by its obligations.¹⁸

While the provisions of the various international human rights instruments are not automatically enforceable in Australia, there is provision under some additional *Optional Protocols* for particular UN treaty bodies to receive and consider personal 'communications' alleging a breach of a State's international obligations under an instrument to which it is a party. Any such Optional Protocols need to be signed and ratified by Australia for it to be available to people within Australian jurisdiction. A person making a communication to a relevant treaty body must have also first exhausted all domestic remedies to the alleged breach before a treaty body will consider the communication.

On 28 July 2010, through Resolution 64/292,¹⁹ the United Nations General Assembly explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realisation of all human rights. The Resolution calls upon States and international organisations to provide financial resources, help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all. While 122 Nations voted in favour of this Resolution and none voted against, Australia was one of the 41 Nations who abstained from voting.

The United Nation's factsheet on the Human Right to Water provides the following definitions related to the content of the right:²⁰

- *Sufficient*: The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. According to the World Health Organization (WHO), between 50 and 100 litres of water per person per day are needed to ensure that most basic needs are met and few health concerns arise.

¹⁶ Committee on Economic, Social and Cultural Rights 'General Comment 21: Right of everyone to take part in cultural life (art. 15, para 1(a))' (21 December 2009) E/C.12/GC/21, at 36.

¹⁷ *Optional Protocol to the International Convention on Economic Social and Cultural Rights*, entered into force on 5th May 2013

¹⁸ *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273

¹⁹ Resolution A/RES/64/292. United Nations General Assembly, July 2010

²⁰ See <https://www.unwater.org/water-facts/human-rights/>

- *Safe*: The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. Measures of drinking-water safety are usually defined by national and/or local standards for drinking-water quality. The World Health Organization (WHO) Guidelines for drinking-water quality provide a basis for the development of national standards that, if properly implemented, will ensure the safety of drinking-water.
- *Acceptable*: Water should be of an acceptable colour, odour and taste for each personal or domestic use. [...] All water facilities and services must be culturally appropriate and sensitive to gender, lifecycle and privacy requirements.
- *Physically accessible*: Everyone has the right to a water and sanitation service that is physically accessible within, or in the immediate vicinity of the household, educational institution, workplace or health institution. According to WHO, the water source has to be within 1,000 metres of the home and collection time should not exceed 30 minutes.

Affordable: Water, and water facilities and services, must be affordable for all. The United Nations Development Programme (UNDP) suggests that water costs should not exceed 3 per cent of household income.

These emerging developments coincide with the United Nation's 'Water for Life' International Decade for Action (2005-2015) and appointment of Special Rapporteur on the human rights to safe drinking water and sanitation. Notwithstanding the fact that Australia abstained from voting, the Resolution provides authoritative guidance on the right to water and implies that all UN treaties and instruments to which Australia is a party should generally be read in alignment with the principle that there is a general human right to clean water and sanitation.

FINDINGS:

FINDING 7: The Australian Government has breached its obligation under Article 14(2)(h) of the *Convention on the Elimination of All Forms of Discrimination Against Women* to ensure that women in communities in the Darling River region enjoy the right to adequate living conditions, particularly in relation to water supply

FINDING 8: The Australian Government has breached its obligation under Article 24 of the *Convention on the Rights of the Child* to ensure that in the Darling River region enjoy the highest attainable standard of health, by inter alia, failing to provide clean drinking-water.

FINDING 9: The Australian Government has breached its obligation under Article 27 of the *International Covenant on Civil and Political Rights* to ensure that indigenous peoples in the Darling River region can exercise their right to enjoy their culture.

FINDING 10: The Australian Government has breached its obligation under Article 11 of the *International Covenant on Economic, Social and Cultural Rights* to ensure that people in the Darling river region enjoy the right to an adequate standard of living.

FINDING 11: The Australian Government has breached its obligation under Article 12 of the *International Covenant on Economic, Social and Cultural Rights* to ensure that people in the Darling river region enjoy the highest attainable standard of physical and mental health.

FINDING 12: The Australian Government has breached its obligation under Article 15 of the *International Covenant on Economic, Social and Cultural Rights* to ensure that indigenous peoples in the Darling River region enjoy their right to take part in their cultural life.

RECOMMENDATIONS:

RECOMMENDATION 15: The Australian Government take immediate steps towards the ratification of the *Optional Protocol to the Convention on the Rights of the Child*

RECOMMENDATION 16: The Australian Government take immediate steps towards the ratification of the *Optional Protocol to the Covenant on Economic, Social and Cultural Rights*

8.3 GOVERNMENT NON-COMPLIANCE WITH EMERGING INTERNATIONAL NORMS

As noted in 8.2, Australian Government and Basin States have demonstrated a failure to meet the standards of *existing* international and relevant laws in Australia. The Australian Government and Basin States have also demonstrated a failure to engage with or meet the standards of existing international norms providing protections against persecution and the destruction of culture for minority and ethnic groups. Additionally, the Australian Government and Basin States have failed to comply with the standards inherent in *emerging* international norms and laws, which impose a stronger duty of care on environmental management and custodianship - namely the emerging law of ecocide and rapidly growing movement introducing Rights of Nature laws in countries around the world.

8.3.1 Ecocide

The testimonies shared at the Tribunal demonstrated that the Barka/Darling River is in catastrophic collapse and many people living along the river are deeply concerned that the whole system is dead.

Ecocide is defined as “loss or damage to, or destruction of ecosystem(s) of a given territory(ies), such that peaceful enjoyment by the inhabitants has been or will be severely diminished.”

Ecocide is not yet law internationally or in Australia, but it has been introduced as a law in several countries in Europe and a significant international movement exists that is advocating for ecocide to be made a crime under international law.

The move to criminalize environmental harm would be the next step in addressing existing deficiencies in water management in Australia. This would allow Australian peoples and the Australian Government to: utilise criminal sanction to reinforce compliance; enforce environmental norms; stigmatise and constrain certain actions; distinguish between licit and illicit uses of water; impute individual criminal responsibility, and; ultimately deter and prevent significant ecological harm.

There have already been some criminal prosecutions in Australia relating to water theft, however these relate to the tampering with water meters and the taking of water contrary to the Water Management Act (ie pumping water during an embargo).

Evidence of unsustainable patterns of exploitation of the river’s resources and unprecedented levels of catastrophic human harm on our natural environment, is a good reason to argue that the

management of water system should have increased penalties and remedies, such as those found in criminal law. Only penal sanctions can provide a clear denunciation and designation of criminal behaviour, determine a normative threshold and establish an enforcement mechanism capable of imposing legal consequences.

It is of note that the MDBA is a corporation capable of suing and being sued, and that the evolving law in this area is crystalizing the notion of corporate criminal responsibility and corporate complicity for acts/omissions the cause significant and durable destruction to an ecosystem, or ecosystem service, upon which human populations rely.

FINDINGS:

FINDING 13: Basin Governments have made decisions, and omitted to make decisions, that have led to ecological harm on a massive scale, that meets the definition of ecocide. In particular, decisions which led to excessive amounts of water being extracted from the dryland river system, decisions to allow flood plain harvesting, and decisions to ignore scientific, First Nations peoples and local community advice about how to care for the river have led to significant ecological harm.

RECOMMENDATIONS:

RECOMMENDATION 17: That civil society groups (non-government organisations and community groups) investigate the extent to which Government policies and laws that have created environmental destruction on such a large scale, would meet the standards of ecocide, and provide a report to the community and Basin governments about how to ameliorate and avoid committing ecocide.

8.3.2 Rights of Nature

More than a dozen jurisdictions around the world have introduced Rights of Nature laws in the past five years. Rights of nature is one of the fastest developing fields of law at present. Rights of nature laws aim to reject the notion that nature is merely human property, and instead recognises in law, that the living world has a legal right to exist, thrive, evolve and regenerate.

The evidence provided in the Citizens' Inquiry has demonstrated a need to create and implement new laws in Australia that reject the concept that river systems and other living systems are just human property that can be exploited and destroyed. There is an urgent need for new laws that ensure careful care, management and protection of living systems so they exist and thrive forever.

In Australia, Rights of Nature and Legal Personhood concepts are appearing in various ways. In a 2017 report by the Australian Panel of Experts on Environmental Law (APEEL), recommendations were made about the 'next generation' of Federal environmental laws in Australia, and Recommendation 8.4 in Technical Report No.8 recommends that rights of nature and legal personhood for nature, should be explored by law makers in Australia.²¹ Rights of nature and community rights concepts are also being used as a communication and advocacy approach for grassroots groups. On 20 March 2018, First Nations peoples and non-indigenous communities of

²¹ Australian Panel of Experts on Environmental Law (APEEL), *Blueprint for the Next Generation of Australian Environmental Law*, August 2017, available at <http://apeel.org.au/>

Margaret River held a rally for the river, demanding it have its own voice and special protections.²² Communities in Hobart also used ‘rights of the mountain’ framing for various rallies for Mount Wellington. On 21 August 2018, Federal Senator Mahreen Faruqi called for Rights of Nature laws in Australia. In November 2019, Diane Evers, Western Australian MP introduced Australia’s first Rights of Nature and Future Generations Bill into an Australian Parliament. And other communities are actively exploring whether advocating for Rights of Nature and local community rights will help them protect their precious local ecosystems from unwanted developments.

RECOMMENDATIONS:

RECOMMENDATIONS 18 - That laws be drafted and introduced for the Barka/Darling River and Menindee Lakes that establish the rights of nature and enable enforcement and restoration when the rights of nature are violated

8.3.3 Genocide

“Genocide” means the destruction of an ethnic group. Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. **Genocide is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.** The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.²³

The evidence provided by people from all communities along the Barka/Darling River and Menindee Lakes points to profoundly disturbing actions and inaction by the Commonwealth and Basin states.

During the Citizen’s Inquiry, Barkandji elders explained that water is intrinsically linked to the cultural and spiritual identity of First Nations. Without the Barka the Barkandji Nation have no mother, no affiliations, no networks of relationships, no social groups, no coordinates, no stable base for life. In addition to depriving First Nations peoples of their livelihood, damaging their principal water source and severely impacting their freedom of movement and communication, the stopping of environmental flow of the Barka/Darling River impacts affected communities by destroying cultural sites, healing places, as well as livelihood and primary food and water sources.

Failure to consult or give people access to basic rights to access water has led to significant devastation of cultural life for First Nation communities (particularly the Barkandji Nation). It has also led to significant devastation for all remote and rural communities who live along the river system.

²² Jane Gleeson White, Guardian, 1 April 2017 <https://www.theguardian.com/australia-news/2018/apr/01/its-only-natural-the-push-to-give-rivers-mountains-and-forests-legal-rights>

²³ Raphael Lemkin *Axis Rule in Occupied Europe* ix. 79

FINDINGS:

FINDING 14: The Australian Government has failed to create policies that would have avoided genocide against both First Nations peoples and remote rural communities, by allowing the Barka/Darling River to cease to function as a river.

8.4 ISSUES REQUIRING FURTHER INVESTIGATION

Section 3.6 of this report detailed the scope and findings of a number of previous reports related to water management and associated issues in the Murray-Darling Basin. Some previous reports include:

- Murray-Darling Basin Plan Five-year assessment: Productivity Commission Inquiry Report:
- Murray-Darling Basin Royal Commission Report
- Investigation of the Causes of Mass Fish Kills in the Menindee Region NSW over the Summer of 2018–2019: Australian Academy of Science
- Independent Assessment of the 2018-19 Fish Deaths in the Lower Darling

Many of these reports have been limited to specific subject-areas such as mass fish deaths in the Darling River and Menindee Lakes in 2018-19. Reports such as the Productivity Commission Review focus specifically on the implementation of the Murray-Darling Basin Plan. Arguably, the most comprehensive report to date has been the South Australian Royal Commission report, however even the scope of this report is limited by its Terms of Reference which understandably contain the scope of the report to the implementation of the Murray-Darling Basin Plan within the State of South Australia.

Throughout the course of the Citizen's Inquiry we were repeatedly told that the causes of the crisis went beyond State boundaries. We were told for example that the manner in which water is used in northern basin States had significant impacts on the quality and availability of water downstream in lower basin States. If for example, water users were building dams or engaging in floodplain harvesting upstream, then communities downstream were adversely affected.

We were told that since the causes of the crisis went beyond State boundaries, adequate solutions to the crisis would only come from a coordinated National effort, rather than piecemeal and inconsistent efforts by different Basin States. Some of the solutions offered by Inquiry participants included the development of alternative governance mechanisms which included a stronger role for Federal management of water, to remove conflicting management systems and goals between the states. Some of the suggested elements of a stronger Federal role included the idea of a National Water Management approach and National Water Ombudsman.

The development of this type of National Water Management approach first requires a National, whole-of-ecosystem approach to investigating the causes of the crisis and making recommendations to mitigate the impacts of this crisis, and to ensure such a crisis does not occur again in the future.

8.4.1 The need for a Federal Royal Commission

Having heard the evidence of people from affected communities, it is the view of the Inquiry Panel that there is a need for a National investigation into the causes of the current crisis. It is essential

that the body undertaking the investigation be independent from State and Federal governments and have broad ranging powers to investigate and make recommendations to the Governments of each Basin State and the Federal Government.

RECOMMENDATIONS:

RECOMMENDATION 19: The Australian Government establish a Royal Commission into Water Management in the Darling River ecosystem

RECOMMENDATION 20: The Australian Government establish terms of reference for the Royal Commission into Water Management in the Darling River ecosystem which includes:

- A. Inquiry into how the state of the Darling River system has changed since Federation until the present day
- B. Inquiry into causes of degradation of the health of the Darling River system
- C. Inquiry into impacts of this change on local businesses and industries, small-scale farmers and the economic wellbeing of communities located along the Darling River system
- D. Inquiry into impacts of this change on the physical and mental health of people in communities located along the Darling River system
- E. Inquiry into impacts of this change on the social and cultural life of people in communities located along the Darling River system
- F. Inquiry into impacts of this change on the social, economic and cultural lives of First Nations peoples in communities along the Darling River system
- G. Inquiry into the legal implications of water management of the Darling River system on the Native Title rights of Native Title holders in communities along the Darling River system
- H. Inquiry into the legal implications of water management of the Darling river system into the human rights of people in communities located along the Darling River system
- I. Inquiry about the legal implications of water management of the Darling river system with respect to the Australian Government's international obligations under international treaties
- J. Inquiry into economic, legal and social solutions to support people in communities along the Darling River system
- K. Inquiry into economic, social, political and legal solutions to cease harmful activities which are contributing to, or intensifying, the degradation of the Darling River system
- L. Inquiry into short-, medium- and long-term solutions to restore the health of the Darling River system
- M. Inquiry into legal mechanisms required to provide protection for the Darling River system from degradation into the future

RECOMMENDATION 21: The Australian Government establish terms of reference which provide the Royal Commission into Water Management in the Darling River with broad powers to:

- A. Establish and conduct public hearings into relevant case studies
- B. Receive and consider online or written submissions from parties with relevant information
- C. Establish and conduct face-to-face or online roundtables with key stakeholders and representatives
- D. Receive and consider online or written submissions from members of the public

- E. Receive and consider direct personal testimonies from people in communities located along the Darling River system in community forums to be held in select communities along the Darling River system**
- F. Receive and consider direct personal testimonies from people in communities located along the Darling River system by participation in a face-to-face private session with a Royal Commissioner.**

RECOMMENDATION 22: The Australian Government determine the full terms of reference of the Royal Commission with consultation with local councils, established community groups and Native Title representatives from communities along the Darling River system

RECOMMENDATION 23: The Australian Government establish an open consultation process for a limited amount of time to allow other interested parties to make submissions regarding the terms of reference for the Royal Commission into Water Management in the Darling River ecosystem

RECOMMENDATION 24: The Australian Government appoint a minimum of four and maximum of seven Royal Commissioners including:

- A. A Royal Commissioner with relevant experience and expertise relating to the economic dimensions of water management of Australia's rivers**
- B. A Royal Commissioner with relevant experience and expertise relating to the scientific dimensions of water management of Australia's rivers**
- C. A Royal Commissioner with relevant legal experience and expertise relating to the legal dimensions of water management in Australia**
- D. A Royal Commissioner from an Aboriginal or Torres Strait Islander background**

8.4.2 The need to investigate allegations of corruption, abuse of power and misuse of public office

Due to the scale of public interest and concern about government mismanagement and corruption an investigation through an independent and public process is required and justified. Allegations of corruption and water theft require investigation and to restore integrity and legitimacy of the government. It is vital that the cause of the failure of the current governance framework is objectively assessed and reported in order to inform the development of a new governance structure.

Inquiry participants made a number of alarming allegations against Ministerial and Departmental officers which require investigation and, if proved, prosecution in order to preserve the legitimacy of these positions.

8.4.2.1 Allegations that the NSW Government has 'decommissioned' the Menindee Lakes

One such allegation was that the NSW Government was deliberately 'decommissioning' the Menindee Lakes against community wishes and contrary to their statutory obligations. Lower Darling River residents have pointed the finger at the Murray Darling Basin Authority for releasing flood water from Menindee Lakes in 2017, arguing that had it been held back, until there would have been fresh supplies to replenish the river.

In fact the water was released under the Menindee Lakes Water Saving Project which aims to deliver on NSW Government's commitment to the Murray Darling Basin Plan to adjust the sustainable diversion limit by reducing evaporative losses. However, residents say the Lakes were drained in 2016-17 at a time when downstream areas did not need water - South Australia was experiencing flooding and all Murray irrigation demand was met.

The MDBA's policy was aimed at reducing high evaporation rates from Menindee Lakes as a guiding factor for its management regime. But residents believe that it is an unusual logic that says that, the Menindee Lakes will deliver more environmental water to the Murray Darling river system, by reducing evaporation from the lakes. Residents say that it will leave the lower Darling drier more often, cutting off the Murray from the Darling and leading to unknown environmental consequences for fish, bird and land-based wildlife that depend on the river. They also raised serious concerns about the impact on fish nurseries in the Menindee Lakes, which help restock the entire river.

The reality is that the amount of water retrieved under the Murray-Darling Basin plan for environmental flows fell short of their target. Buying water rights back from irrigators proved to be only part of the solution. So former agriculture minister Barnaby Joyce, proposed that the water could be found from projects that deliver "equivalent environmental outcomes" which translated into essentially borrowing water from the environment to pay back to the environment. Menindee residents contested the view that reducing evaporation rates - translated to water savings, as a false economy.²⁴

8.4.2.2 Allegations that the creation and administration of water markets has been biased towards corporate private water users

An underlying theme of many testimonies was the claim that collective water supplies are being appropriated by private users seeking to commodify what was formerly a common resource (ie part of the global commons). The blame is placed squarely with the national government that has redistributed environmental governance, resource management and social control to private users. The handing over of this key role of regulatory oversight has contributed to a re-framing of, large-scale commercial use of water as a legal entitlement.²⁵

One participant suggested that water licences should attach to the land, so that if a farmer sells the water allocation he/she cannot simply establish themselves somewhere else. The rot really set in when water entitlements separated water property rights from land title.

The commodification of water, although not a new phenomenon, is considered part of market-based approaches to water governance which began to take off in the UK, US and Australia in the late 1980s and early 1990s, under neoliberal governments. Under neoliberal economic policies, it is argued that through the establishment of private property rights and market mechanisms - water will be allocated more efficiently. However communities say that water trading has become the preserve of *in-the-*

²⁴ The Deloitte report Lower Darling Water Security Options Analysis FINDINGS REPORT (2018) hydrological review highlights that high-security water entitlements located on the Darling River downstream of Weir 32 and upstream of the Wentworth Weir will experience less reliable water supply following the implementation of the proposed Menindee lakes project. Deloitte report Lower Darling Water Security Options Analysis FINDINGS REPORT NSW Department of Industry October 2018

²⁵ Karunanathan M., Can the human right to water disrupt neoliberal water policies in the era of corporate policy-making? Geoforum Vol 98 January 2019 pp244-253 at p. 250.

know farmers and irrigators. Since the advent of real-time pricing, irrigators, farmers, water brokers and investors can now trade water up and down the Murray-Darling – it's open to all.

The conflict around the Basin Plan is typically presented as agriculture versus the environment, or upstream states versus downstream states. While such framing helps politicians and advocacy groups champion their respective constituents, it distracts from the more important point – that Aboriginal people, graziers, downstream water users, communities, small irrigators and the environment are being sacrificed for the profits of ever more powerful irrigation corporations. What is important is the concentration of power and water in the hands of few people, and their ability to influence decisions that affect their own financial interests, to the detriment of everyone else and the environment.²⁶

Participants expressed the concern that their human right to water were being eroded by this system of water commodification. Water trading under the Australian licencing is in direct opposition to the recognition of the human right to water and global movement geared towards the establishment of communal water rights based on a new socio-ecological reality (ie; “new community economies”).

Of particular concern to the Panel is the consistent allegations that the current system of water trading has been established, and is continually being administered in such a way to favour the interests of large-scale corporate irrigators. This is a particularly concerning allegation when considered in light of other allegations that have been made in the media alleging that some of these large-scale corporate irrigators have connections to, and have made political donations to the Liberal-National Party.

A further allegation which the Panel heard consistently from the communities in and around Broken Hill, was that a large, taxpayer-funded pipeline which had been built from the Menindee Lakes to Broken Hill was not in fact designed to supply water to the local community in Broken Hill as initially claimed by the Government, but rather was providing water to a mine close by.

The Panel is concerned that these allegations, if not properly investigated, could significantly impact the trust Australian citizens have in the integrity of their government. The Inquiry Panel is of the opinion that an inquiry by an independent commission into alleged corruption would be most effective with respect to any alleged crimes or misuse of public office, as such an inquiry could enforce findings and decisions.

RECOMMENDATIONS:

RECOMMENDATION 25: The Australian Government establish an Independent Commission into Alleged Corruption (ICAC)

RECOMMENDATION 26: The Australian Government provide a newly formed ICAC with broad investigative powers included the power to refer serious allegations of misconduct, corruption and misfeasance by public officers to the Australian Federal Police

RECOMMENDATION 27: Once established, ICAC engage in a broad ranging investigation into Water Management in the Darling River ecosystem and fully investigate:

²⁶ Slattery. M and Campbell, 2018. Trickle Out Effect, The Australia Institute

- A. Allegations that the NSW Government has ‘decommissioned’ the Menindee Lakes and all related matters
- B. Allegations that the taxpayer-funded Broken Hill pipeline was diverting water from the Menindee Lakes to a commercially operated mine.
- C. Allegations that the creation and administration of water markets has been biased towards corporate private water users

8.5 THE NEED FOR NEW GOVERNANCE APPROACHES

The testimonies shared at the Tribunal demonstrated that the Barka/Darling River is in catastrophic collapse and the current governance system has failed to ensure the river system has the capacity to exist, thrive, regenerate and support life. A large number of positive reforms need to be made, in order to create a new governance system that restores and supports the health of the river system and river communities for the long term.

8.5.1 The need for “life centred” river governance, led by First Nations peoples and local communities

RECOMMENDATION 28: That the knowledge and wisdom of First Nations peoples and local communities be respected by all Basin Governments and allowed to *lead efforts* to review and improve governance structures for the Barka/Darling River and Menindee Lakes

RECOMMENDATION 29: That First Nations peoples and local communities along the Barka/Darling River consider creating *a new civil society river representation group, to raise the voice of all citizens who live along the river.*

- The new group would operate independently of government, and aim to provide a strong voice from citizens into decision making processes that are currently dominated by governments and businesses
- The new group could work like a confederation of other groups. In other words, it would NOT aim to replace other groups, but would recognise, respect and include existing First Nations groups and recognise, respect and include existing local not-for-profit community groups and small businesses that share the same values and goals in supporting the life of the Barka. The purpose of the confederation would be to create a new way for all citizens dependent on the Barka/Darling for their life and livelihoods to *work together and speak for the wellbeing of the environment and human communities along the Barka/Darling River.*

RECOMMENDATION 30: New governance structures be designed to safeguard against the domination of water allocation decision making by private interests of politicians and commercial entities.

RECOMMENDATION 31: The NSW Police establish a Water Resources Crime Squad to investigate and prosecute crimes that affect the people, communities and environment of the Barka/Darling River catchment and its headwaters. The Crime Squad should have the powers to investigate and prosecute matters including water theft, illegal water extraction and flood plains harvesting.

8.5.2 The need for new laws that recognise the Barka/Darling River and Menindee Lakes as a holistic living system

RECOMMENDATION 32 - That new laws be drafted and passed into law by Basin Governments that recognise the Barka/Darling River and Menindee Lakes as a holistic living system, recognise the Rights of Nature within the system and recognise First Nations peoples 'First Laws' and obligations to Care for Country.

8.5.3 The need to ban all extractive activities in the Barka/Darling River basin, including mining, fracking and unconventional oil and gas extraction

RECOMMENDATION 33 - That no oil, mining or gas exploration or extraction be allowed in the Darling River basin nor within a safe, scientifically determined distance from it, for perpetuity.

8.5.4 The need to redesign river governance systems and human economic systems, to fit within the biophysical capacity of the Barka/Darling dryland river system

RECOMMENDATION 34 - That new governance approaches must take into account the biophysical realities of the Barka/Darling River and Menindee Lakes as dryland river systems, and develop new, appropriate forms of human economic activity, including (but not limited to) *transitioning from irrigated agriculture to appropriate dryland agriculture* and other activities that do not extract water from the river system

8.6 LONG TERM RESTORATION

8.6.1 The need for major, long term investment in ecological restoration

RECOMMENDATION 35: That Basin Governments create a Barka/Darling River Restoration Fund that will be managed and administered to carry out the priorities and strategies identified by First Nations peoples and local communities in the Emergency Community River Restoration Plan.

RECOMMENDATION 36: That First Nations peoples and local river community members be permanently funded to carry out ecological and wildlife restoration programs along the Barka/Darling River catchment and headwaters, including extensive funding for Indigenous Ranger programs.

RECOMMENDATION 37: That Basin Governments fund a public education campaign about the threats to and solutions for restoring, rivers and waterways in Australia, including the Barka/Darling River.

8.6.2 The need for major, long term investment in restoration of community economies and societies

RECOMMENDATION 38: That Basin Governments, led by the NSW Government, carry out economic analysis and fund economic activities, to support and rebuild devastated local communities along the Barka/Darling River and Menindee Lakes, with a focus on building new, local economies

8.6.2 The need for regional and national ecological education about dryland river systems

RECOMMENDATION 39: That the Basin Governments provide significant funding for a multi-year, public information campaign about the threats to and solutions for restoring, rivers and waterways in Australia, including the Barka/Darling River.

APPENDIX – SUMMARY OF FINDINGS & RECOMMENDATIONS

FINDINGS OF THE INQUIRY PANEL

FINDING 1: The *Water Act 2007* imposes an implied duty on administrators, governments and water managements to ensure that water management under the Basin Plan is undertaken in a way which ensures that critical human needs are met. Despite this, the *Water Act 2007*:

- fails to provide any effective enforcement mechanisms to ensure compliance with this duty; and
- fails to provide any remedies or recourse to persons whose critical human needs are not met under the Basin Plan.

FINDING 2: The Australian Government has failed to protect the ecological values and ecosystem services of the Murray-Darling Basin, taking into account, in particular, the impact that the taking of water has on the watercourses, lakes, wetlands, ground water and water-dependent ecosystems that are part of the Basin water resources and on associated biodiversity as per the provisions (section (d)(ii) Objects) of the *Water Act 2007*.

FINDING 3: The Australian Government has failed to return the river to sustainable water or recover adequate environmental water sufficient to restore protected wetlands, water dependant ecosystems or endangered species populations.

FINDING 4: The Australian Government has breached its obligation under the Native Title Act to provide adequate water resources for drinking purposes to First Nation communities.

FINDING 5: The Australian Government has breached its obligation under the Native Title Act to ensure that First Nations communities are able to access their traditional food sources.

FINDING 6: The Australian Government has breached its obligation under the Native Title Act to ensure that First Nations communities are able to engage in their traditional cultural practices.

FINDING 7: The Australian Government has breached its obligation under Article 14(2)(h) of the *Convention on the Elimination of All Forms of Discrimination Against Women* to ensure that women in communities in the Darling River region enjoy the right to adequate living conditions, particularly in relation to water supply

FINDING 8: The Australian Government has breached its obligation under Article 24 of the *Convention on the Rights of the Child* to ensure that in the Darling River region enjoy the highest attainable standard of health, by inter alia, failing to provide clean drinking-water.

FINDING 9: The Australian Government has breached its obligation under Article 27 of the *International Covenant on Civil and Political Rights* to ensure that indigenous peoples in the Darling River region can exercise their right to enjoy their culture.

FINDING 10: The Australian Government has breached its obligation under Article 11 of the *International Covenant on Economic, Social and Cultural Rights* to ensure that people in the Darling river region enjoy the right to an adequate standard of living.

FINDING 11: The Australian Government has breached its obligation under Article 12 of the *International Covenant on Economic, Social and Cultural Rights* to ensure that people in the Darling river region enjoy the highest attainable standard of physical and mental health.

FINDING 12: The Australian Government has breached its obligation under Article 15 of the *International Covenant on Economic, Social and Cultural Rights* to ensure that indigenous peoples in the Darling River region enjoy their right to take part in their cultural life.

FINDING 13: Basin Governments have made decisions, and omitted to make decisions, that have led to ecological harm on a massive scale, that meets the definition of ecocide. In particular, decisions which led to excessive amounts of water being extracted from the dryland river system, decisions to allow flood plain harvesting, and decisions to ignore scientific, First Nations peoples and local community advice about how to care for the river have led to significant ecological harm.

FINDING 14: The Australian Government has failed to create policies that would have avoided genocide against both First Nations peoples and remote rural communities, by allowing the Barka/Darling River to cease to function as a river.

RECOMMENDATIONS OF THE INQUIRY PANEL

RECOMMENDATION 1: Basin States immediately provide *funding* for First Nations peoples and local communities along the Barka/Darling River to collaboratively design and develop an Emergency Community River Restoration Plan. The Plan should focus on ensuring healthy river flows, restoring the Menindee Lakes and guaranteeing that sufficient volumes of clean, healthy water will always remain in the Barka/Darling River during drought, as it used to in the past.

RECOMMENDATION 2: Basin States immediately fund a River Ecological Restoration Fund, that will be used to implement the Emergency Community River Restoration Plan.

RECOMMENDATION 3: Basin States take immediate action to *end water trading in Australia*, including an immediate moratorium on water trading and a transition plan to repeal relevant legislation.

RECOMMENDATION 4: Basin States place a *moratorium on the granting of any new water licences* that would allow water extraction from the Barka/Darling River catchment and headwaters until the Emergency Community River Restoration Plan is created and implemented.

RECOMMENDATION 5: Basin States impose an *immediate ban on all flood plain harvesting and introduce new laws to remove existing flood plain harvesting structures* throughout the Barka/Darling River catchment system.

RECOMMENDATION 6: Basin States place a *moratorium on all groundwater extraction* from the Barka/Darling River catchment until the Emergency Community River Restoration Plan is created and implemented.

RECOMMENDATION 7: Basin States *ban all future large scale extraction from the Barka/Darling River system* and fund a transition plan to phase out all existing large-scale extraction from the top of the Barka/Darling River system, in accordance with the Emergency Community River Restoration Plan.

RECOMMENDATION 8: Basin States create and fund an Emergency Barka/Darling River Community Health Fund that will be administered in compliance with the priorities identified by affected communities.

RECOMMENDATION 9: Basin States work with affected communities, to use the Emergency Barka/Darling River Community Health Fund to pay for and organise the immediate provision of clean, safe and free potable water to all affected communities, for as long as it takes to restore the health of the river system and ensure a safe water supply for river communities.

RECOMMENDATION 10: Basin States immediately fund an investigation into motor-neurone disease and other health problems (including skin rashes and other skin problems) suspected of being caused by people having to use poor quality water in Menindee, Wilcannia and other affected communities.

RECOMMENDATION 11: the NSW government provide financing for improved health care facilities, mental, physical and dental, for the towns along the Barka/Darling River Basin within NSW.

Recommendation 12: The Water Regulations 2008 (Cth) be amended to list the International Covenant on Economic, Social and Cultural Rights as a “relevant international agreement” for the purposes of s. 4 of the Water Act 2007 (Cth)

Recommendation 13: The Water Act 2007 (Cth) be amended to create enforceable personal rights with respect to ‘critical human water needs’

Recommendation 14: The Water Act 2007 (Cth), s. 86(H) be amended to create compliance mechanisms for other agencies and persons in relation to a breach of ‘critical human water needs’

RECOMMENDATION 15: The Australian Government take immediate steps towards the ratification of the *Optional Protocol to the Convention on the Rights of the Child*

RECOMMENDATION 16: The Australian Government take immediate steps towards the ratification of the *Optional Protocol to the Covenant on Economic, Social and Cultural Rights*

RECOMMENDATION 17: That civil society groups (non-government organisations and community groups) investigate the extent to which Government policies and laws that have created environmental destruction on such a large scale, would meet the standards of ecocide, and provide a report to the community and Basin governments about how to ameliorate and avoid committing ecocide.

RECOMMENDATIONS 18 - That laws be drafted and introduced for the Barka/Darling River and Menindee Lakes that establish the rights of nature and enable enforcement and restoration when the rights of nature are violated

RECOMMENDATION 19: The Australian Government establish a Royal Commission into Water Management in the Darling River ecosystem

RECOMMENDATION 20: The Australian Government establish terms of reference for the Royal Commission into Water Management in the Darling River ecosystem which includes:

- N. Inquiry into how the state of the Darling River system has changed since Federation until the present day
- O. Inquiry into causes of degradation of the health of the Darling River system
- P. Inquiry into impacts of this change on local businesses and industries, small-scale farmers and the economic wellbeing of communities located along the Darling River system
- Q. Inquiry into impacts of this change on the physical and mental health of people in communities located along the Darling River system
- R. Inquiry into impacts of this change on the social and cultural life of people in communities located along the Darling River system
- S. Inquiry into impacts of this change on the social, economic and cultural lives of First Nations peoples in communities along the Darling River system
- T. Inquiry into the legal implications of water management of the Darling River system on the Native Title rights of Native Title holders in communities along the Darling River system
- U. Inquiry into the legal implications of water management of the Darling river system into the human rights of people in communities located along the Darling River system
- V. Inquiry about the legal implications of water management of the Darling river system with respect to the Australian Government's international obligations under international treaties
- W. Inquiry into economic, legal and social solutions to support people in communities along the Darling River system
- X. Inquiry into economic, social, political and legal solutions to cease harmful activities which are contributing to, or intensifying, the degradation of the Darling River system
- Y. Inquiry into short-, medium- and long-term solutions to restore the health of the Darling River system
- Z. Inquiry into legal mechanisms required to provide protection for the Darling River system from degradation into the future

RECOMMENDATION 21: The Australian Government establish terms of reference which provide the Royal Commission into Water Management in the Darling River with broad powers to:

- G. Establish and conduct public hearings into relevant case studies
- H. Receive and consider online or written submissions from parties with relevant information
- I. Establish and conduct face-to-face or online roundtables with key stakeholders and representatives
- J. Receive and consider online or written submissions from members of the public
- K. Receive and consider direct personal testimonies from people in communities located along the Darling River system in community forums to be held in select communities along the Darling River system
- L. Receive and consider direct personal testimonies from people in communities located along the Darling River system by participation in a face-to-face private session with a Royal Commissioner.

RECOMMENDATION 22: The Australian Government determine the full terms of reference of the Royal Commission with consultation with local councils, established community groups and Native Title representatives from communities along the Darling River system

RECOMMENDATION 23: The Australian Government establish an open consultation process for a limited amount of time to allow other interested parties to make submissions regarding the terms of reference for the Royal Commission into Water Management in the Darling River ecosystem

RECOMMENDATION 24: The Australian Government appoint a minimum of four and maximum of seven Royal Commissioners including:

- E. A Royal Commissioner with relevant experience and expertise relating to the economic dimensions of water management of Australia's rivers
- F. A Royal Commissioner with relevant experience and expertise relating to the scientific dimensions of water management of Australia's rivers
- G. A Royal Commissioner with relevant legal experience and expertise relating to the legal dimensions of water management in Australia
- H. A Royal Commissioner from an Aboriginal or Torres Strait Islander background

RECOMMENDATION 25: The Australian Government establish an Independent Commission into Alleged Corruption (ICAC)

RECOMMENDATION 26: The Australian Government provide a newly formed ICAC with broad investigative powers included the power to refer serious allegations of misconduct, corruption and misfeasance by public officers to the Australian Federal Police

RECOMMENDATION 27: Once established, ICAC engage in a broad ranging investigation into Water Management in the Darling River ecosystem and fully investigate:

- A. Allegations that the NSW Government has 'decommissioned' the Menindee Lakes and all related matters
- B. Allegations that the taxpayer-funded Broken Hill pipeline was diverting water from the Menindee Lakes to a commercially operated mine.
- C. Allegations that the creation and administration of water markets has been biased towards corporate private water users

RECOMMENDATION 28: That the knowledge and wisdom of First Nations peoples and local communities be respected by all Basin Governments and allowed to *lead efforts* to review and improve governance structures for the Barka/Darling River and Menindee Lakes

RECOMMENDATION 29: That First Nations peoples and local communities along the Barka/Darling River consider creating *a new civil society river representation group, to raise the voice of all citizens who live along the river.*

- The new group would operate independently of government, and aim to provide a strong voice from citizens into decision making processes that are currently dominated by governments and businesses
- The new group could work like a confederation of other groups. In other words, it would NOT aim to replace other groups, but would recognise, respect and include existing First Nations groups and recognise, respect and include existing local not-for-profit community groups and small businesses that share the same values and goals in supporting the life of the Barka. The purpose of the confederation would be to create a new way for all citizens dependent on the Barka/Darling for their life and livelihoods to *work together and speak for the wellbeing of the environment and human communities along the Barka/Darling River.*

RECOMMENDATION 30: New governance structures be designed to safeguard against the domination of water allocation decision making by private interests of politicians and commercial entities.

RECOMMENDATION 31: The NSW Police establish a Water Resources Crime Squad to investigate and prosecute crimes that affect the people, communities and environment of the Barka/Darling River catchment and its headwaters. The Crime Squad should have the powers to investigate and prosecute matters including water theft, illegal water extraction and flood plains harvesting.

RECOMMENDATION 32 - That new laws be drafted and passed into law by Basin Governments that recognise the Barka/Darling River and Menindee Lakes as a holistic living system, recognise the Rights of Nature within the system and recognise First Nations peoples 'First Laws' and obligations to Care for Country.

RECOMMENDATION 33 - That no oil, mining or gas exploration or extraction be allowed in the Darling River basin nor within a safe, scientifically determined distance from it, for perpetuity.

RECOMMENDATION 34 - That new governance approaches must take into account the biophysical realities of the Barka/Darling River and Menindee Lakes as dryland river systems, and develop new, appropriate forms of human economic activity, including (but not limited to) *transitioning from irrigated agriculture to appropriate dryland agriculture* and other activities that do not extract water from the river system

RECOMMENDATION 35: That Basin Governments create a Barka/Darling River Restoration Fund that will be managed and administered to carry out the priorities and strategies identified by First Nations peoples and local communities in the Emergency Community River Restoration Plan.

RECOMMENDATION 36: That First Nations peoples and local river community members be permanently funded to carry out ecological and wildlife restoration programs along the Barka/Darling River catchment and headwaters, including extensive funding for Indigenous Ranger programs.

RECOMMENDATION 37: That Basin Governments fund a public education campaign about the threats to and solutions for restoring, rivers and waterways in Australia, including the Barka/Darling River.

RECOMMENDATION 39: That the Basin Governments provide significant funding for a multi-year, public information campaign about the threats to and solutions for restoring, rivers and waterways in Australia, including the Barka/Darling River.