

24 August 2018



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The Hon David Littleproud MP  
Minister for Agriculture and Water Resources  
Parliament House  
Canberra ACT 2600

**Re. Assessment of Wimmera-Mallee Water Resource Plan**

Dear Minister,

We are pleased to submit our recommendations following an assessment of the Water Resource Plan for the Wimmera-Mallee region (WM WRP).

Following an assessment process outlined below, MLDRIN has formed the view that the WM WRP does not fulfil the requirements of Basin Plan Chapter 10, Part 14.

MLDRIN's review of the plan, informed by input from Delegates and representatives of the First Nations engaged, has highlighted a number of key shortcomings including

- Significant and avoidable delays and omissions in engagement with Traditional Owner groups in the plan area
- 'Mistaken assumptions'<sup>1</sup> about the water-related interests of Aboriginal Nation groups, leading to decisions that excluded key culturally significant water resources from the scope of the plan until last minute
- Inadequate identification of the objectives of the Aboriginal Nations of the WRP area reflecting, in some cases, insufficient and ad-hoc engagement with Nations
- Inadequate and, in some cases, absent identification of outcomes desired by the Aboriginal Nations of the WRP
- Failure to identify a registered Native Title claim in the WRP area
- The absence of any Objectives, Outcomes or consideration of Traditional Owner interests relating to the Avon and Richardson Rivers
- References to engagement activities conducted outside the WRP area and not related to water resources in the WRP area as evidence of 'having regard'

These deficiencies are discussed in more detail below and in our completed Assessment Framework attached.

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<sup>1</sup> State of Victoria. Wimmera – Mallee Water Resource Plan. *Comprehensive Report*. p. 218

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MLDRIN recommends that the WM WRP, in its current form, not be accredited as a Water Resource Plan under the Basin Plan as it does not meet the requirements of Chapter 10, Part 14. We recommend the following course of action:

- MDBA to refer the WRP back to the State of Victoria with a detailed outline of deficiencies and areas for improvement
- The State of Victoria to develop a structured Aboriginal Engagement Plan to address gaps and ensure all relevant Nation groups are appropriately consulted for the preparation of the WRP
- The State of Victoria to re-draft Chapter 11 of the Comprehensive Report, any Accredited Text associated with the Chapter 10, Part 14 requirements and any associated component of the WRP, including the Consultation Report
- The State of Victoria to re-submit an updated WRP before the June 2019 deadline for WRP accreditation

A structured program of consultation is needed to address key gaps and ensure all Nations have adequate opportunity to put forward their views regarding water resources in the region.

### **Assessment approach**

This formal assessment of the WM WRP was undertaken by MLDRIN in accordance with the note included under Part 14 of Chapter 10 of the Basin Plan.

MLDRIN's assessment was informed by reviewing a number of key requirements and guidelines (including Basin Plan Chapter 10 - Part 14, MDBA Guidelines, the Akwe:Kon guidelines and MLDRIN's 2016 WRP Discussion Paper). The assessment was conducted in a way that respects the cultural authority of Nations, reviewing the plan in line with their objectives, outcomes, values and uses.

MLDRIN formulated an assessment framework. The framework used a Leichardt Scale to guide and focus assessment of performance against key requirements, criteria and guidelines. It also included qualitative input based on discussions between Nation Delegates, MLDRIN staff and others. This resulted in a user-friendly but comprehensive assessment.

The assessment included

- A two-day workshop attended by MLDRIN staff and Chairperson, DELWP staff, MDBA staff and MLDRIN Delegates or representatives of the following Nations: Ngintait (First Peoples of the Millewa Mallee), Dja Dja Wurrung, Wamba Wamba, Tati Tati, Barengi Gadjin Land Council
- Regular engagement with Victoria DELWP staff on preparation and drafting of the plan between 2015-2018
- Targeted engagement with relevant MLDRIN Nations representatives and key contacts who were not able to participate in the workshop.

The assessment allowed MLDRIN to identify where the WM WRP had met the Basin Plan requirements and where there was partial fulfilment or major gaps.

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## **Findings**

When assessing the WM WRP against the requirements stipulated in Chapter 10, Part 14 of the Basin Plan, MLDRIN found that the Plan demonstrated satisfactory compliance in the following sections:

- 10.52(3): Identifying opportunities to strengthen the protection of Indigenous values and Indigenous uses
- 10.53(1)(f): Having regard to risks to Indigenous values and Indigenous uses arising from the use and management of the water resources of the water resource
- 10.55: Maintenance of levels of protection as provided for in interim WRPs

The following requirements were found to have been only partially fulfilled:

- 10.52(1) (a) & (b): Identification of Objectives and Outcomes
- 10.52(2) (a) & (b): Having regard to Indigenous Value and Indigenous Uses
- 10.53(1) (a), (b), (c), (d) & (e): Consultation and preparation of water resource plans
- 10.54: Cultural Flows

When assessing the SAMR WRP against the 'Assessment Template' criteria provided by the MDBA, MLDRIN found the plan demonstrated only partial compliance with all five criteria. MLDRIN notes that in many cases, approaches to consultation and the preparation of the WRP fell far short of best practice guidelines provided by the MDBA and by MLDRIN in collaborative forums and formal guidance.

Given the length and complexity of the WRP document, MLDRIN was not able to undertake a review of the WRP against the Akwe:Kon guidelines.

## **Other Matters**

In addition to the assessment of the WRP's compliance with requirements stipulated in Chapter 10, Part 14 of the Basin Plan, MLDRIN wishes to raise the following key concerns.

### **Lake Albacutya Ecological Character Description and best available science**

MLDRIN advises that it appears from documents compromising or underpinning the WMWRP that this instrument will not protect and restore the Lake Albacutya Ramsar Site.

The Minister and MDBA is exercising powers and performing functions in relation to the Basin Plan, such as assessing or accrediting WRPs, must act on the basis of the best available scientific knowledge.

In at least one key respect best available scientific knowledge appears not to have been incorporated into the WMWRP and this gap should inform the assessment.

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This is the absence of reference to and consideration of the Lake Albacutya Ramsar Site Ecological Character Description. It is additionally a requirement that the Basin Plan take account of that Ecological Character Description ('LAECD').<sup>2</sup>

The absence of the LAECD in informing the WMWRP is relevant to various aspects of the plan's preparation and assessment, including:

1. The identification of water resources in the WMWRP area (water resources can include a lake or wetland whether or not it currently has water in it, and all physical and ecological components of the water resource<sup>3</sup>);
2. Identifying and managing priority environmental assets in the WMWRPA area;<sup>4</sup>
3. The protection and restoration of the Ramsar Site and other water-dependent ecosystems protected under treaty obligations (eg Bonn Convention, CAMBA, JAMBA, RoKAMBA)<sup>5</sup> and thereby give effect to relevant international agreements; and
4. The contribution of the protection and restoration of priority environmental sites (including the Ramsar Site) to the enjoyment of native title rights and interests held by BGLC.

### **Consistency with international agreements**

A key feature of the Water Act and the Basin Plan is to give effect to international agreements, such as the Ramsar Convention protecting wetlands and migratory bird treaties protecting waterbirds and shorebirds. The WMWRP is intended to operate in this context. Incorporation and reference to environmental water planning (eg LTWP, Ch 8 of the Basin Plan) is an important part of WRPs delivering on these international obligations.

Key wetlands and waterways to which international obligations apply are included in what are termed 'priority environmental assets' under the Basin Plan and WMWRP.

There is one Ramsar Site within the WMWRP – Lake Albacutya. As a Ramsar site it is considered a priority environmental asset. This is particularly relevant to assessment of the WMRP for several reasons:

1. Protection and restoration of the ecological character of Lake Albacutya is also relevant to the protection and restoration of Lake Hindmarsh, Outlet Creek, and the Wimmera River as priority environmental assets, as far as hydrology and water resources are concerned;
2. There are specific outcomes and management obligations for Lake Albacutya arising from its status as a Ramsar Site, the most important can be found in

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<sup>2</sup> Water Act 2007 (Cth), subs 21(3)(c)

<sup>3</sup> Water Act 2007 (Cth), s 5 ('water resource')

<sup>4</sup> See *Wimmera-Mallee Long-term Watering Plan* (2015), Appendix 3, Table 16, p 78

<sup>5</sup> Basin Plan (2012) s 8.05(2);

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- the Ecological Character Description ('ECD') for that site<sup>6</sup> including Limits of Acceptable Change ('LAC');
3. These outcomes and obligations can be measured (assessed) against what is contained in the WMWRP, especially in relation to environmental flows and management of the hydrology (water flows) of the Wimmera River and terminal lakes system;
  4. The protection and restoration of Lake Albacutya (and hence the lower Wimmera River and terminal lakes) intersect directly with native title enjoyed by Wotjobaluk and held by BGLC.

The Basin Plan requires that consideration be given to whether the WMWRP should include rules to ensure that environmental watering requirements of priority environmental assets (eg Lake Albacutya) are not compromised. In short, one question is whether the WMWRP needs to include rules to ensure the terminal lakes receive sufficient water so that their baseline 'ecological character' as seasonal arid zone lakes is maintained. The WMWRP concludes that no such rules are required. None are included.<sup>7</sup>

Assessment of the WMWRP needs to take into account the Ecological Character Description of the Lake Albacutya Ramsar Site including the requirement to maintain the ecological character of the site based on baseline conditions. The LAC tool is intended to ensure this maintenance of ecological character.

The WMWRP does not appear to take into account in any systematic and applied manner the ECD, or consider whether there are risks or threats to the LAC, or, if so, what response to those risks/threats is appropriate.

The ECD provides key scientific input into the question of baseline ecological and hydrological management of Lake Albacutya, which includes:

5. That the hydrological cycle of Lake Albacutya (ie seasonal flows and watering) is the most important factor to its ecological character;<sup>8</sup>
6. River regulation (including by the now extensive headworks) is a key factor in the current hydrological cycle;<sup>9</sup>
7. The LAC for Lake Albacutya in respect of hydrology is:
  - a. A 24 month duration lake-full event on average every 20 years;
  - b. A shallow flood event of at least 9 months duration on average every 8 years.<sup>10</sup>

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<sup>6</sup> A. Cibilic and L White 2010. *Ecological Character Description for Lake Albacutya, a Wetland of International Importance - a report prepared for the Department of Sustainability, Environment, Water, Population and Communities* (2010)

<sup>7</sup> Pp 238-246

<sup>8</sup> Cibilic and White, 64

<sup>9</sup> Cibilic and White, 27-28, 64-70

<sup>10</sup> Cibilic and White, 23-24, 118-120

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The Environmental Watering Plan prepared for the Wimmera River system estimates a lake full event for Lake Albacutya under current conditions to occur *every 20 years on average for a 6 month event on average and every 50 years for a 24 month event on average*.<sup>11</sup> The EWP is a constituent document of the Long-term Watering Plan for the Wimmera-Mallee and the draft WMWRP would require compliance with these watering plans.<sup>12</sup>

There appears to be a significant disparity between scientific opinion as to what is required to maintain the ecological character of Lake Albacutya and what may occur or is intended to be delivered through environmental watering arrangements.

As a consequence of modification and interference in the hydrological cycle of the Wimmera River and terminal lakes system (including, for example, upstream storages and extensive farm dams across the catchment) current hydrological benchmarks for Lake Albacutya lie outside of the LAC.

In short, under current and proposed arrangements associated with the WMWRP, water resources management may not accord with the LAC for the Lake Albacutya Ramsar Site, a situation that may lead to the compromise of its ecological character and failure of Australia to meet its obligations under the Ramsar Convention.

It may be appropriate or necessary for the WMWRP to include rules in respect of environmental watering requirements for Lake Albacutya in order to maintain the ecological character of that site within LAC.

One example of such a rule may be to require Victoria to establish a rule or condition on a water management law or instrument committing water to flows into the terminal lakes system when certain triggers or conditions are met.<sup>13</sup>

### **Impacts on Indigenous Values and Uses and Native Title rights**

By extension of the above, it appears management of water resources in the Wimmera system could compromise Traditional Owners' enjoyment of native title recognised in respect of that Ramsar Site and other lands in the lower Wimmera River

The apparent disparity between watering (hydrological) needs for Lake Albacutya Ramsar Site and intended actions under the WMWRP and LTWP is relevant to First Nations' interests (including uses and values) in this particular, important example. Specifically, long-term change and degradation of the terminal lakes system may adversely impact on Traditional Owners enjoyment of native title to the lands on the lower Wimmera River and terminal lakes system. For instance, long-term changes in ecological character could include loss of redgum or black box woodlands or wetland

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<sup>11</sup> Wimmera CMA Wimmera River System Environmental Watering Management Plan, 57 Table 3-5; DELWP Long-term EWP, 40, Table 6

<sup>12</sup> Draft WMWRP, 160

<sup>13</sup> Compare Wimmera CMA Wimmera River System Environmental Watering Management Plan, 119-122

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faunal breeding events in ways that undermine cultural connection and/or revitalisation of culture to which native title is connected.

Non-exclusive native title is held by BGLC on behalf of traditional owners to lands along the Wimmera River, as well as the beds of Lake Hindmarsh, Outlet Creek and Lake Albacutya.<sup>14</sup> In his judgement on the consent determination, Merkel J made reference to the connection by the Traditional Owners, through traditional laws and customs, to 'some of the land and waters to the claim area' (emphasis added).<sup>15</sup> No native title was determined in the waters of the Wimmera River or terminal lakes system.

His Honour cited one of the elders who gave evidence before the Court, Uncle Jack Kennedy, who stated:<sup>16</sup>

*'I am looking forward to getting some of my country back before I die so I can die knowing I have done what the elders expected of me. The Beal trees are dying at Lake Albacutya because they are not getting enough water. If we look after the river properly it will run clear again, run all the way to the Teardrop Lakes. If the Wotjobaluk continue to follow Bunjil then things will go on as the old people would want.'*

This determination and judgment clearly identified the intimate connection between Traditional Owner rights and interests in the Wimmera River and terminal lakes system and the management of water resources.

Native title rights and interests and the intended protections of the Water Act and Basin Plan coincide in protection for Lake Albacutya (in particular as a Ramsar Site) and Lake Hindmarsh and Outlet Creek. As noted above, the Basin Plan is required to give effect to international agreements including the Ramsar Convention and this requires maintaining the Ecological Character of, in the case of the WMWRP, Lake Albacutya. That would appear to be clearly consistent with the outcomes sought by the Traditional Owners and the traditional laws and customs underpinning native title.

Focusing on Lake Albacutya specifically, it is unclear:

1. As to whether Wotjobaluk, as represented by BGLC, were consulted on their views in relation to native title in Lake Albacutya;
2. If so consulted, how views relating to Lake Albacutya have been considered in the WMWRP; and
3. If consulted, as to whether the potential for adverse changes to the Ecological Character of Lake Albacutya were put to native title holders/Traditional Owners for their views.

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<sup>14</sup> Clark v Victoria [2005] FCA 1795, Order 3 at Attachment 1. See also Schedule 3 Parts 1 and 2.

<sup>15</sup> Clark v Victoria [2005] FCA 1795, [10]

<sup>16</sup> Clark v Victoria [2005] FCA 1795, [9]

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If BGLC's views were not sought on how the use and management of water resources might affect their native title rights and interests it is arguable Chapter 10 Part 14 obligations have not been complied with correctly.

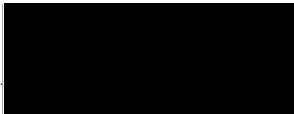
There appears to be a strong correlation between indigenous uses and values in respect of the terminal lakes system of the lower Wimmera and the effective implementation of Australia's Ramsar obligations. There is a case to be made that the WMWRP should pay closer attention to the protection and restoration of Lake Albacutya in particular. It is at best uncertain that measures provided for in the WMWRP will or can do this. The absence of considered treatment of Ramsar obligations is a notable gap in the WMWRP.

It would be preferable for the text of the WMWRP to be revised to:

4. Acknowledge expressly the Lake Albacutya Ramsar Site ECD;
5. Include obligations to deliver a model of environmental watering consistent with the ECD (including where the basis for this model is identified in the current environmental watering plans);
6. Include obligations ensure participatory management with BGLC in Ramsar Site management including of water resources.

We look forward to being able to continue to work with Basin States, The MDBA and Aboriginal Nations to ensure that the preparation and assessment of WRPs achieves best practice and supports genuine outcomes for Traditional Owners.

Yours sincerely,

A black rectangular redaction box covering the signature of Rene Woods.

Rene Woods  
Chairperson, MLDRIN