Question 1: In relation to the MDBA's "Water Resource Plans Part 14 Guidelines" document:

Question 1 (i) is this a document you commend and support?

1. MLDRIN finds the document a useful tool to encourage appropriate engagement and as a reference point for standards the preparation of WRPs. MLDRIN has had some input into the guidance through Joint Water Resource Planning meeting (involving representatives of State governments and the MDBA). We note that when MLDRIN initially presented the guidance, responsible staff acknowledged that they had not reviewed or considered inputs from MLDRIN's Discussion Paper 'Ensuring equity in the preparation and assessment of Water Resource Plans'. MDBA undertook to consult that document and amend the guidance accordingly.

2. We note that the document has two key elements: 1) information about MDBA's approach to assessing Chapter 10, Part 14 requirements and 2) guidance on good practice in terms of consultation with First Nations and development of WRPs. Given the already weak and discretionary nature of the Basin Plan requirements, the guidance on best practice represents a reasonable strong standard for engagement and consultation.

3. MLDRIN's position on these matters foregrounds the importance of implementing appropriate strategies to address First Nation's objectives, through tangible strategies and commitments that amend or improve water management arrangements in a WRP area.

4. We note that, while this guidance anticipates the *possibility* of changes to water management as consequence of consultation on the WRP, which is a positive acknowledgement, nothing in the Guidelines requires, insists on or asserts an imperative to change water resources management in light of indigenous consultation.

5. As a *descriptive* device of good practice consultation – practice that foreshadows scope for change (pre- and post-WRP) in favour of indigenous interests – the Guidelines are useful.

Question 1(ii) if you were to treat it as a binding document, do you think your concerns as to process (putting aside the question of substance) would be met if these Guidelines were followed?

MLDRIN's view, following from the points made above, is that, if these Guidelines were binding in character:

6. They would be useful in laying down certain basic procedural obligations, such as the autonomy of indigenous organisations identifying objectives and outcomes, and the timing and conduct of consultations.

7. These basic procedural guidelines do not appear to follow or adapt fully the *Akwe:Kon Guidelines* (leaving aside how this adaptation should occur from development project impact assessment to water resource planning). For instance, *Akwe:Kon* requirements for provisions of financial, technical and human resources sufficient to enable indigenous participation is not included in the MDBA guidelines. As far as we're aware, this key provision (eg technical and expert resourcing) has not

be made available to indigenous organisations in WRP preparation, despite the highly technical and complex nature of the issues.

8. The major gap between the consultation models presented in the Guidelines and a model such as 'deep consultation' on the Canadian approach is the absence of a legally binding obligation on those preparing a WRP not only to consult but to accommodate the views and positions advanced by indigenous people and organisations. Accommodation requires a preparedness on the part of water planners/decision-makers to shift their position or terms and also to actually do so. It does not necessarily mean indigenous organisation would have any veto rights over a plan/decision as a whole. It does mean outcomes or terms can and will be changed as a consequence of discussions. It is analogous to a right to negotiate.

9. The Guidelines do not bridge this gap. For example, in explanation of the requirement to 'have regard to' indigenous views the Guidelines state that 'best practice could be for a WRP to include information that goes a step further, to address "so what" – in other words, information about how outcomes for Aboriginal values and uses can be strengthened.' There are obvious weaknesses in this drafting even where this a binding provision, including 'best practice *could* be' and the requirement is to better *inform* how uses and values can be strengthened not *identify and implement* (strengthened) outcomes reflective of indigenous objectives or views.
10. In summary, MLDRIN believes that, if these guidelines were binding, they would provide an improvement on the current provisions of the Basin Plan, but they would NOT provide an adequate framework for consultation and inclusion of First Nations' rights and interests in water resource planning.

Question 2. In MLDRIN's supplementary submission, para. 8 recommends (in relation to the earlier recommendation in para. 6 there be a new Part in the Act) that the policy basis of the new Part should include obligations that the Crown must act "with honour and in good faith":
Can you please advise whether "honour and good faith" are intended as one concept or two separate concepts? Could you provide some more detail about the intended meaning (especially re "with honour", and noting that "in good faith" tends to have a certain meaning in contract law)?

11. In respect of question 2, the concepts of the Crown being obliged to proceed 'with honour and in good faith' also derives from the Canadian experience. The distinct constitutional and common law circumstances in Canada were noted in the submissions. In essence, the distinction is that in Canada the history of treaty-making between government and First Nations has given rise to a fiduciary relationship between them, requiring the Crown to act in First Nations' best interests when exercising discretionary control over Aboriginal interests, and by extension acting with honour and integrity in the conduct of negotiation or decision-making. The purpose of the latter is reconciliation of asserted Crown sovereignty and pre-existing Aboriginal sovereignty.

12. In the Canadian context, treaty-making provides a basis on which the Crown is to act diligently and generously in fulfilment of the promises underpinning those agreements.

13. While the treaty-making context does not operate in Australia currently (although the recent Victorian passage of treaty-making legislation should be noted), there are two common factors to Australia and Canada that can extend to natural resources decision-making:

14. Pre-existing Aboriginal societies, laws and customs are recognised in Australia as in Canada (as a product of the *Mabo* decision);

15. It is appropriate that Australian governments' policies and actions proceed on a basis of reconciliation and co-existence, as in Canada.

16. So the conduct of governments should be directed to recognition, reconciliation and co-existence. Taking the concept of 'honour' and applying it to water resource planning this might mean:

17. Governments should be required to act generously and respectfully and take a broad purposive approach to engagement with Aboriginal organisations in respect of water planning and water resources management.

18. The obligation to act honourably requires government to recognise First Nations' interests in water and give those interests respect, including respect for the historic impacts of colonisation on First Nations' attachments to waters.

19. Governments should not act in a legalistic manner or take advantage of power and resource imbalances with First Nations' groups. The onus should be on government to act fairly and demonstrate fair and generous conduct.

20. Governments should act protectively toward First Nations' interests in water, as an extension of protecting and contributing to the revitalisation of their special and distinct relationships in water. This is also in recognition that such protection and revitalisation benefits the whole nation.

21. 'Good faith' is perhaps a sub-set of the honour of the Crown. The term implies interactions and standards conduct between parties, in this case governments and First Nation groups. The implication is not only that each act honestly and transparently but in addition are obliged to cooperate.

22. In the present context good faith might be said to include an obligation on governments to cooperate with First Nations group in order to achieve outcomes that contribute to reconciliation and repair historic injustices relating to water.

23. The Canadian standard includes the requirement that the Crown substantially address Aboriginal/First Nations concerns, which can lead to the model of 'deep consultation' (consultation and accommodation).