

Submission

in response to

Review of the Water Act 2007 (Cth)

prepared by

Environmental Justice Australia

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Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. At the same time, we pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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INTRODUCTION

Environmental Justice Australia (formally Environment Defenders Office Victoria) has considerable experience advising on water law at both the state and federal level. We have been involved in the development of the *Water Act 2007* (Cth) (**Water Act**) and the Murray-Darling Basin Plan (**Basin Plan**) for many years. In conjunction with peak environment groups, we reviewed and commented on the Water Act as it was being developed. We have also been advising peak environment groups across Basin States for the past four years on the development of the Basin Plan and the interpretation of the Water Act.

SUMMARY OF KEY POINTS

The following key points are raised in this submission:

- The core elements of the Water Act should be maintained in their current form, to ensure the Basin continues on its path to long term sustainability.
- The Water Act is still in the early stages of implementation and therefore it is too early to say whether the current approaches to implementing the Water Act will achieve its objectives. As raised in previous submissions we have serious concerns with the way the Basin Plan and SDLs were developed in relation to the Water Act, and the resulting difficulties this will create in meeting the objectives of the Act. In light of this, governments must work hard to implement the next stages of the Water Act and Basin Plan in a way that will assist the objects of the Act being met.
- Imposing a cap on buy backs for water recovery to achieve the SDL will be an obstacle to meeting the objectives of the Act.
- We do not support the use of the SDL adjustment mechanism to facilitate supply measures. The SDL adjustment mechanism poses a real risk of eating away at the already inadequate recovery target with no net environmental improvements.
- Supply measures are not equal to legal entitlements held by the CEWH and pose considerable risks. If governments continue with the supply measure process, safeguards must be places around them as outlined in the body of this submission.
- The CEWH must be made more independent through establishment of an independent agency
- The CEWH's ability to trade environmental water must continue to be bound by environment objectives. The CEWH should not be allowed to trade water to raise funds for operating or administration costs, or any other purpose.
- The Water Act should be amended to give greater recognition to the needs and interests of indigenous people.

BACKGROUND

In accordance with s253 of the Water Act, the purpose of the Review is primarily to consider how the Act is operating and how well the objectives of the Act are being met.

253 Review of operation of Act

Before the end of 2014, the Minister must cause to be conducted a review of:

- (a) the operation of this Act; and

(b) the extent to which the objects of this Act have been achieved.¹

Section 253 also includes the mandatory terms of reference (which the government has referred to when establishing this review). Section 253 makes it clear that the scope of the review is the extent to which the Water Act and Basin Plan are being implemented, rather than a review of the provisions of the Act itself or of the matters already determined in the Basin Plan. For example it should not include a review the SDLs themselves, but the extent to which the SDLs are being met.

The Water Act must be maintained in its current form

The Water Act was ground breaking legislation when it was passed by the Howard Government. It was the first (and remains the only) piece of legislation in Australia that genuinely operationalises sustainable water use. Its implementation over the past five years has been difficult for all involved, but absolutely essential to ensuring the ongoing health of the Basin and viability of agriculture, tourism, fishing and other activities that rely on it. The Water Act is as necessary now as it was in 2007. The core elements of the Act should be maintained in their current form, to ensure the Basin continues on its path to long term sustainability.

As the Panel would be aware, the Water Act anticipated that the Basin Plan would have been in force for a number of years before this review occurred, and the SDLs would have started to come into force. It is too early to make a proper assessment of whether the Water Act is achieving its objectives as it has not had time to fulfil its potential, and will not until the SDLs are fully in place in 2019. The Act must be allowed to continue in its primary goal of achieving sustainability in the Basin, otherwise the system will continue the severe ecological decline felt in the previous years and decades.

The purpose of the Act

There has been much misunderstanding and misinterpretation of the Water Act over the past five years, and this has greatly impacted the way it is being implemented. It is useful at this point to reflect on the purpose of the Water Act to ensure that any recommendations made as part of this review properly relate to the objects of the Act.

Purpose of the Act

The key purpose of the Water Act is to return extraction in the Basin to long term sustainable levels to support both the ecosystems that depend on the Basin and continued productive use of the Basin.² The Water Act and the Basin Plan are based on a recognition that current extraction levels are unsustainable and have been for many years, and that this is causing environmental degradation, impacting on human use of the water (e.g. through salinity), and affecting water security for all users. The key component of the Water Act and the Basin Plan is the requirement to establish sustainable diversion limits (**SDLs**) across the Basin. The SDLs must be set at a level which reflects an environmentally sustainable level of extraction.

¹ s253(1) Water Act 2007 (Cth)

²This can be seen through the objects of the Act, the purpose and basis of the Basin Plan in ss3, 20 &21.

The objects of the Act are wide ranging, including giving effect to international agreements, ensuring a return to environmentally sustainable levels of extraction for water resources that are overallocated or overused, improving water security for all users, protecting and restoring ecological values and ecosystem services, improving water security and achieving efficient and effective water management.

Although much prominence has been given in discussion around the Water Act and Basin Plan to the requirement to 'optimise environmental, social and economic outcomes' this is not in fact a priority requirement of the Act. The requirement to 'optimise' is a lower order requirement than many of the others in the Act, as it is mentioned only in guiding provisions (purposes and objectives) rather than operational provisions, and in the objects provision is expressed to be *subject to* the requirement to give effect to international agreements.

As can be seen from the above, the objects should not just be read as a list of equally weighted objects. The structure of s3 shows that there is a priority. Objects (a) (b) (e) (f) (g) and (h) have the highest priority. Object (c) is subject to object (b) and object (d) is subject to objects (b) and (c). Object (d)(iii) is subject to objects (d)(i) and (d)(ii). For example, the objective to maximise net economic returns to the Australian community from the use of Basin water resources is *subject to* the objectives to return to environmentally sustainable levels of extraction and protect and restore ecological values. Objects must also be read in conjunction with the s20 purposes of the Basin Plan.

TERM OF REFERENCE 2(a) - THE EFFECTIVENESS OF THE ACT IN ACHIEVING ITS OBJECTS

Is the Act achieving its objects?

The Act is still in the early stages of implementation and therefore it is too early to say whether the current approaches to implementing the Act will achieve its objectives. However, for context it is worth re-iterating our concerns with the way the Act has been implemented to date through the Basin Plan and SDLs, that is likely to result in the objects of the Act not being fully met. To summarise:

- Key elements of the Basin Plan do not accord with the Act as they are required to do, such as the management objectives of the Basin Plan in Part 5.³
- The SDLs in the Basin Plan do not comply with the Act in that they prioritise social and economic considerations above environmental sustainability and are likely to compromise a number of key ecosystem functions, key environmental assets, the productive base of the water resource, and key environmental outcomes. Thus they are not based on an ecologically sustainable level of take or best available science as required by the Act⁴

³ See ANEDO submission on the proposed Murray-Darling Basin Plan 16 April 2012 p9 at <http://envirojustice.org.au/submissions-and-issues-papers/submission-on-the-proposed-murray-darling-basin-plan>

⁴ See ANEDO submission on the proposed Murray-Darling Basin Plan 16 April 2012 p10; and CSIRO *Science Review of the Environmentally Sustainable Level of Take for the Murray Darling Basin* November 2011

- The requirement to give effect to international agreements is not met through the Basin Plan, in particular the Ramsar Convention and the Biodiversity Convention⁵
- The decision to significantly increase groundwater extraction via the SDLs does not reflect best available science and the precautionary principle.⁶
- The SDL adjustment mechanism does not accord with the requirement to deliver an ESLT and best available science.⁷

Notwithstanding these failings, the work done to date under the Basin Plan to contribute to achieving sustainable extraction levels in the Basin is critical and must continue. There is still opportunity for improvement in a number of these areas, as many processes that will contribute to the objects of the Act being met are currently in train or have not yet commenced. This includes the development of Water Resource Plans by the States and their accreditation by the MDBA, the implementation of the SDL adjustment mechanism, and the ongoing management of environmental water by the Commonwealth Environmental Water Holder (CEWH).

Commonwealth and State government agencies responsible for implementation of the Act must do more to ensure the objects of the Act are met. It is critical that governments improve their implementation of the Act at all possible points to achieve a genuinely sustainable future for the Basin. If implemented properly, the benefits of achieving sustainable extraction levels and delivering environmental water will be far reaching and benefit all sectors.

Things that may prevent the Act from achieving its objectives

There are a number of proposed implementation issues that will make it harder for the Act to achieve its objectives. The following two are examples. Other issues are outlined in other parts of this submission.

Cap on water buy backs

Imposing a cap on buy backs for water recovery to achieve the SDL, and in particular including such a cap in the Act as has been proposed, will be an obstacle to meeting the objectives of the Act. The Commonwealth has spent the same amount of money on water purchase as it has on infrastructure projects and yet the water purchase has recovered *twice* as much water.⁸ The National Commission of Audit has stated that water purchase is the most efficient form of water recovery and that infrastructure funding provides significant private benefits to landholders⁹. The lowest cost option for water recovery is via water purchase and so buy backs should remain the primary method of achieving the

⁵ See ANEDO submission on the proposed Murray-Darling Basin Plan 16 April 2012 p21; and Jonathan La Nauze and Emma Carmody, 'Will the Basin Plan Uphold Australia's Ramsar Convention Obligations? (2012) (September), *Australian Environment Review* 311

⁶ ANEDO submission on the proposed Murray-Darling Basin Plan 16 April 2012 p18; and Foerster, A 2013, 'The Murray-Darling Basin plan 2012: An environmentally sustainable level of trade-off?', *Australasian Journal of Natural Resources Law and Policy*, vol. 16, no. 1, pp. 41-60.

⁷ ANEDO submission on Water Amendment (Long Term Average Sustainable Diversion Limit Adjustment Mechanism) Bill 2012 <http://envirojustice.org.au/submissions-and-issues-papers/submission-on-water-amendment-long-term-average-sustainable-diversion>

⁸ The Commonwealth has spent \$2,256 million on water purchase to recover 1,142 GL and \$2,307 million on infrastructure projects to recover 543 GL. See *Water Recovery Strategy for the Murray-Darling Basin* <http://www.environment.gov.au/system/files/resources/4ccb1c76-655b-4380-8e94-419185d5c777/files/water-recovery-strategy-mdb2.pdf>

⁹ http://www.ncoa.gov.au/report/docs/phase_one_report.pdf p167

SDL. Limiting the options available in the future to achieve the SDLs by proscribing such a limit in the Act is counter-productive.

Reducing independence of agencies

Reducing the independence of agencies and institutions tasked with developing, implementing and auditing the Water Act and Basin Plan will make it harder to achieving the objectives of the Act. The National Water Commission played a very important role in ensuring States were implementing the water reform necessary to achieve the Water Act and Basin Plan objectives and ensuring their actions were transparent and accountable. The disbanding of the National Water Commission is to the detriment of the entire water reform agenda. Their audit and reporting functions must be taken up by another agency as a priority. Additionally, the MDBA is doing some very good work in providing technical support to States and the Commonwealth, supporting community engagement particularly indigenous engagement, and conducting work programs - as those around constraints - that are unlikely to occur without their involvement. The MDBA should be maintained as a strong, independent, adequately funded agency to continue this work.

TERM OF REFERENCE 1(a)(ii) – THE EXTENT TO WHICH THE SDLs ARE BEING IMPLEMENTED

SDL adjustment mechanism

The SDL adjustment mechanism is included in the Water Act at s23A and 23B. As noted in previous submissions¹⁰, the SDL adjustment mechanism as currently framed will not assist in meeting the objects of the Act as it does not assist in delivering an ESLT and is not based on best available science, which has found that a much greater volume of water is required to meet the environmental targets. The adjustment mechanism was a political compromise made to facilitate passage of the Basin Plan rather than a genuine attempt at meeting the requirements of the Act. As such the SDL adjustment mechanism poses a real risk of eating away at the already inadequate recovery target with no net environmental improvements. For this reason we do not support the use of the SDL adjustment mechanism to facilitate supply measures and increase the SDL (reduce recovery of water for the environment). However if the government is determined to continue with the processes of supply measures, stringent controls must be placed around them to minimise the negative impact they will have. We therefore make the following comments.

The practical impact of approved supply measures is that for every ML of environmental water that the supply measure is deemed to be 'equivalent' to, one less ML will be secured in the environmental water holdings held by the CEWH. However, infrastructure projects are not equivalent to environmental entitlements held by the CEWH. The entitlements that make up the environmental water holdings are permanent, proprietary rights that (given the predicted drying impacts of climate change) will likely increase in value over time. They are required by law to be used for public environmental benefit in perpetuity. The Act imposes requirements and safeguards on the CEWH to ensure that

¹⁰ ANEDO submission on Water Amendment (Long Term Average Sustainable Diversion Limit Adjustment Mechanism) Bill 2012 <http://envirojustice.org.au/submissions-and-issues-papers/submission-on-water-amendment-long-term-average-sustainable-diversion>

this occurs. For example, they must be managed in accordance with the purpose of the CEWH, the environmental watering plan, Ministerial rules, and other rights and obligations that flow from their status as legal water entitlements.

Supply measure infrastructure projects on the other hand are simply a physical structure, with a limited life, that will depreciate over time. It is difficult (if not impossible) to determine and verify their environmental benefit and equivalence to held environmental water. Despite the detailed modelling being conducted by the MDBA, there is still considerable uncertainty (including within the MDBA) as to whether the models and approach being used are accurate and capable of determining equivalence.

Further, supply measures are not bound by the same legal requirements or safeguards that environmental water holdings are, to provide assurance to government and the public that they will continue to provide their estimated environmental benefits. This whole area is very much an experiment at this stage and should be viewed with caution.

Supply measures will cost the Australian public \$1.3 billion. There needs to be clear and stringent safeguards around this process to ensure this significant public investment is justified and provides the benefit it is touted as providing.

At a minimum, the following safeguards should be applied to any supply measure projects.

- While the MDBA is attempting to make the modelling for determining environmental equivalence as sound as possible, they cannot provide any guarantees that equivalence will result. The final determination of equivalence should therefore be very conservative to take account of uncertainty in environmental benefits from these types of projects. For example, a 20% discount should be applied to the estimated equivalences, to take account of the significant uncertainty of this untested process.
- Proponents of supply measures should be required to state the cost of maintaining and upgrading the infrastructure for the full life of the infrastructure during the business case phase of assessment of supply measures so that it can be factored in to the cost of the investment. Legal agreement must be made up front on who is responsible for those costs.
- Proponents of supply measures should be required to state the estimated life of the infrastructure as part of the business case. In recognition of the fact that infrastructure projects have a limited life versus environmental water holdings which provide benefit in perpetuity, the final determination of equivalence should be appropriately discounted, as occurs in carbon offsetting schemes (e.g. if permanence is considered to be 100 years, a project with a 50 year life should be discounted by 50%).
- The rules relating to SDL adjustment measures require that supply measures must be operating by 2024, otherwise the SDL will be re-adjusted back accordingly. However there is no provision for what occurs after that date. It is likely that some supply projects will only be just beginning to operate in 2024. If after 2024 a supply measure infrastructure project does not provide the equivalent environmental benefit that it was assessed as providing at the time it was accepted as a supply measure, or the infrastructure fails before the estimated life of the project, it should no longer result in an adjustment to the SDL and the

SDL should be recalculated accordingly. This requirement should be included in the Basin Plan and in contracts with supply measure proponents.

- Ongoing monitoring of infrastructure will be required over the life of the infrastructure to ensure supply measures continue to operate as expected (or at all), with two yearly reporting to the MDBA.

Efficiency measures

A further concern is the lack of attention being given to the efficiency measures part of the SDL adjustment mechanism. The States are putting significant time and effort into proposing supply measures - for obvious reasons - but there appears to be little corresponding effort put into developing efficiency measures by the Commonwealth Department of Environment and the States. If the full benefits of efficiency measures are to be realised by the 2016 cut off date, their development must be given equal (i.e. urgent) time and effort.

Commonwealth Environmental Water Holder

The Commonwealth Environmental Water Holder (CEWH) and the Commonwealth environmental water holdings play a critical part in achieving the objects of the Act. The CEWH is integrally linked with the success of the SDL, as the majority of the water recovered under the SDL will be held and managed by the CEWH. The environmental water holdings are the mechanism used to apply the SDL water to achieve environmental and sustainability outcomes. The CEWH's management and application of its water is therefore the key way the environmental objectives of the Act will be met.

It is therefore critical to the effectiveness of the Basin Plan and the Water Act that the CEWH continues to operate as an independent statutory entity with clear powers to hold and manage environmental water for the protection and restoration of environmental assets in the Basin.

Independence of the CEWH

Political interference in environmental watering decision-making would result in significant pressure on the CEWH during times of low inflows. This has already occurred in Victoria where there were calls from the Victorian Farmers Federation for the CEWH to do temporary trades in order to reduce water prices¹¹. While a reduction in water prices may be an additional benefit of temporary trades in environmental water in some cases, it should not factor into decision-making. Nor should other non-environmental considerations, particularly when fuelled by the politics of the day rather than the long-term health of the Basin. The independence of the CEWH must be maintained, and strengthened. As recommended by the House of Representatives Standing Committee on Regional Australia in 2011, the CEWH should be separated from the Department of Environment¹² and exist as an independent statutory agency, with its own budget

¹¹ <http://www.weeklytimesnow.com.au/commodities/irrigators-plead-with-federal-government-more-environmental-water-be-offered-for-sale/story-fnkjyj14-1226817542673>

¹² House of Representatives Standing Committee on Regional Australia, *Of drought and Flooding Rains: Inquiry into the impact of the Guide to the Murray-Darling Basin Plan* May 2011 recommendation 20 http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ra/murraydarling/report.htm

appropriation and appropriately skilled staff. The Act should also maintain the CEWH's independence from political interference.

Trade of environmental water holdings

Sections 105 and 106 of the Act place important requirements on the CEWH in regard to trading of the environmental water holdings.

Trading of environmental water is not an end unto itself. It is necessary because of the nature of the entitlements held by the CEWH, in that they are entitlements that were developed to meet the needs of consumptive use. As these entitlements were not developed with the management and delivery of environmental water in mind, limited trade allows the CEWH to better use them to meet its environmental objectives. This should be the only purpose for which trade is allowed. It should not be driven by other considerations such as the need to fund non-flow activities or to increase consumptive water availability, or pay for works, or meet operating and delivery costs. If this occurred it would significantly reduce overall environmental water availability, transferring it from the environmental pool to the consumptive pool, and essentially forming an adjustment to the SDLs.

In our view, an analysis of the impact of applying water charges to water entitlements, and the amount of water the CEWH would need to trade cover those costs, would show that the SDL would be severely impacted, and in some years wiped out entirely. Even paying for a portion of these costs significantly undermines the SDLs.

It is clear therefore that including non-sustainability considerations in trade decisions would make it more difficult to meet the objects of the Act – that is to achieve sustainable extraction in the Basin and return the system to health. In order to achieve the objectives of the Act, the Basin Plan and the SDLs, three things need to occur with regard to trade of the environmental water holdings:

- Governments must adequately resource the management, planning & delivery of environmental water via the CEWH. Requiring the CEWH to trade water to pay for delivery and operating costs is in reality an adjustment of the SDL and a transfer of water back into the consumptive pool.
- The current requirements in s105 and 106 of the Act should be maintained – i.e. that the CEWH makes trading decisions solely for the purpose of protecting or restoring environmental assets and only when the water is not required to meet the objectives of relevant environmental watering plans and cannot be carried over.
- Section 106 of the Act should be amended to include a statement to clarify that the CEWH cannot use proceeds of trade to pay for works, fees, delivery charges, administration and operating costs, monitoring and evaluation, and complementary environmental restoration projects.
- In order to promote transparency and understanding of trades, the CEWH should include in its annual report under s114 information on why its trading decisions were made and the longer term environmental benefit of any trades (i.e. how the trade and subsequent re-investment benefited the environment).

TERM OF REFERENCE 1(a)(v) – THE EXTENT TO WHICH OTHER KEY ELEMENTS OF THE BASIN PLAN ARE BEING IMPLEMENTED

Strengthening indigenous provisions

Despite the National Water Initiative requiring all jurisdictions, including the Commonwealth, to provide for indigenous access to water resources these requirements did not get transferred to the Commonwealth Water Act.¹³ The Water Act's recognition of indigenous interests is inadequate, with just one basic requirement to 'have regard to' Indigenous issues among a long list of other considerations, and one requirement to set up an Indigenous consultation committee.¹⁴ Not only does this lack of recognition in the Act ignore the rights of Indigenous people to water in the Basin, it also ignores the significant co-benefits that can be achieved for the environment by greater Indigenous involvement in water management decisions and recognition of cultural interests. The Basin Plan tries to overcome some of the weaknesses in the Act by providing for indigenous consultation requirements and encouraging recognition of cultural flows, however these should be recognised in law.

The National Water Commission in its 2013 *Review of Indigenous Involvement in Water Planning* found that while consultation and engagement of Indigenous groups had improved in some jurisdictions, there has been little progress in providing water for Indigenous social, cultural, spiritual and economic needs. Greater recognition of this from the Commonwealth would greatly assist this to occur.

The Water Act should be amended to give greater recognition to Indigenous interests and give legal backing to provision of cultural flows. Indigenous groups such as MLDRIN and NBAN in conjunction with the MDBA are currently working on the cultural flows and this work should be supported via the Act. Until Indigenous groups have determined how they would like cultural flows to operate, the Water Act should include a general provision supporting the provision of cultural flows and requiring State and Commonwealth agencies to incorporate Indigenous rights and interests into water resource plans and other relevant processes.

TERM OF REFERENCE 3 - APPROPRIATE FUTURE REVIEW POINTS FOR THE ACT AND BASIN PLAN

It is not necessary for the Act itself to include a further statutory review point. Most legislation does not include this and instead the government can conduct a review when it determines it is necessary. An appropriate point for review of the Basin Plan may be 2024, once the SDLs are in place and have time to make an impact.

¹³ NWI clauses 25 (ix) and 52-54.

¹⁴ Sections 21 and 202. The other 3 mentions of indigenous issues are a basic requirement to include a description of indigenous uses of water in the Basin Plan, and optional appointments to the Basin Committees.