



Environment Victoria submission to the Expert Panel for the review of the Commonwealth Water Act 2007

Environment Victoria is the state's peak non-government, not-for-profit environment organisation. Our Healthy Rivers Campaign is dedicated to working with government, business and communities for the restoration and protection our state's great river systems. Our vision is for a future where healthy rivers sustain abundant life and prosperous communities, providing us with good food, clean water and places to love and enjoy.

Environment Victoria was involved in the development of the Commonwealth Water Act 2007 and welcomes the opportunity to submit to this Review.

In our view, this review of the Water Act 2007 is premature because implementation of the Murray-Darling Basin Plan is behind the schedule that was anticipated when the Act was passed. The Basin Plan was expected to be fully operational in 2014, whereas now this will not occur until 2019. It is therefore impossible to assess how well the Act is performing in achieving its objectives. As the Act is strong environmental legislation that operationalises sustainable water use, we recommend that its core elements should be maintained in their current form, to ensure the Basin is able to continue on the path to long term sustainability.

The purpose of the Act

The Water Act was ground breaking legislation when it was introduced by the Howard Government. It is the only piece of legislation in Australia that genuinely operationalises sustainable water use. It was made in response to the severe ecological decline that has occurred across the Murray-Darling Basin as a result of decades of over extraction and overuse of water, and which was brought into focus by the Millennium drought. Addressing the root causes of the ecological decline remains as important today as in 2007, not only for the ecological health of the Basin but for all the industries that depend on it, particularly irrigated agriculture.

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 over-allocated 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.¹

¹ Act s3

The key purpose of the Act is to return extraction in the Basin to long term sustainable levels to support both fresh water dependent ecosystems and the continued productive use of the Basin.² The 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 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 take (ESLT).

There has been much misunderstanding and misinterpretation of the Act over the past five years, and this has greatly impacted the way it is being implemented. The establishment of an ESLT has been severely compromised by the inclusion of economic and political considerations in its calculation, and a misunderstanding of the requirement to 'optimise environmental, social and economic outcomes'. This is in fact a lower order requirement of the Act, not a priority requirement. In the objectives of the Act it is subject to the requirement to give effect to international agreements.³

Specific comments on Review Terms of Reference

1. ToR 1)a)i) –are the management objectives of the Basin Plan being met?

The management objectives and outcomes of the Basin Plan are more limited than those envisaged in the Act. The Act envisaged that the Plan would be developed on the basis of 'promoting sustainable use of water resources to protect and restore the ecosystems, natural habitats and ecosystems and species that are reliant on Basin water resources and to conserve biodiversity'⁴, in other words an ecologically healthy Basin. The proposed outcome of the Basin Plan is a whole is a 'healthy and working basin'⁵ or even a 'working Basin'⁶. These concepts are not mentioned in the Act and are the result of the compromises made in the determination of the ESLT that underpins the Plan.

These shortcomings notwithstanding, it is too early to tell if the Basin Plan is meeting its objectives. Much of the supporting structure – environmental watering strategy, water resource plans etc are not yet in place, and the SDLs are not due to be fully operational until 2019.

2. ToR 1)a)ii) – are long-term average sustainable diversion limits being met?

Progress is being made on water recovery to meet the SDLs but they are not due to become fully operational until 2019. However their achievement is likely to be compromised in a number of ways.

²Act ss3, 20 &21.

³ Act s3(b)

⁴ Act s 21

⁵ Basin Plan s5.02 (2)

⁶ Basin Plan s 5.03 (1)

a) *The Commonwealth government's cap on water purchase*

This cap was originally set at 1500 GL and is now likely to be reduced to 1300 GL. The recently released *Water Recovery Strategy for the Murray-Darling Basin*⁷ makes its impacts very clear. As of 30/4/14, the Commonwealth has recovered 1,900 GL or almost 70% of the 2,750 GL required by the Basin Plan. It has spent \$2,256 million on water purchase to recover 1,142 GL and \$2,307 million on infrastructure projects to recover 543 GL. Over the next 4 years it is intending to spend a further \$2,341 million on infrastructure projects and \$642 million on water purchase to 'bridge the gap' and acquire the remaining 850 GL to meet the SDLs. At the same time it is confidently expecting to reduce the SDLs by 650GL through supply measures under the SDL adjustment mechanism.

This over reliance in infrastructure projects is making water recovery prohibitively expensive and will make it more difficult to 'bridge the gap' between current levels of use and the SDLs. The National Commission of Audit has made the point that water purchase is the most efficient form of water recovery and that infrastructure funding provides significant private benefits to landholders.⁸

b) *The SDL adjustment mechanism*

The Water Act was amended to include an SDL adjustment mechanism at the request of the Basin states. It was a political compromise to allow the Basin Plan to be made, and its only safeguard is that any adjusted SDL should reflect an ESLT. The Act does not lay out criteria for the adjustment mechanism but says that these should be included in the Basin Plan⁹.

A fundamental problem with the SDL adjustment mechanism as described in the Basin Plan is its reliance on supply measures to reduce the volume of water recovery while achieving the same environmental outcomes. These measures assume that for every ML of environmental water they are deemed to be 'equivalent' to, one less ML will be required as held environmental water. 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 will increase in value over time. They are required by the Act to be used for public environmental benefit in perpetuity.

Supply measure infrastructure projects 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 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 its outcomes are highly uncertain.

⁷ <http://www.environment.gov.au/system/files/resources/4ccb1c76-655b-4380-8e94-419185d5c777/files/water-recovery-strategy-mdb2.pdf>

⁸ http://www.ncoa.gov.au/report/docs/phase_one_report.pdf p167

⁹ Act s 23A

The Commonwealth government has allocated \$1.3 billion for supply measures. There need to be clear and stringent safeguards to ensure this significant public investment is justified and provides the benefit it is supposed to. Environmental Justice Australia has outlined what these safeguards should be in their submission.

A further concern is the lack of attention being given to the efficiency measures side of the SDL adjustment mechanism. The upstream States are putting significant time and effort into proposing supply measures, but little corresponding effort put into developing efficiency measures. The Commonwealth Department of Environment should be taking the lead and promoting efficiency measures to the states. For an equitable adjustment process to occur, efficiency measures must be given equal time and effort to supply measures.

c) The role of the 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 and the Basin Plan. The CEWH is integrally linked with the success of the SDLs, as the majority of the water recovered will be held by the CEWH. The CEWH's management and application of its water is 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 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 has occurred during times of water shortage. For example, pumping of environmental water to Hattah Lakes was repeatedly interrupted during the Victorian state election campaign in 2006.



Sign at Hattah General Store, November 2006

The establishment of environmental water holders at state and federal levels was intended to guarantee independence from this type of interference. The independence of the CEWH is crucial to its effectiveness. As recommended by the House of Representatives Standing Committee on

Regional Australia in 2011, the CEWH should be separated from the Department of Environment¹⁰ and exist as an independent statutory agency, with its own budget appropriation and appropriately skilled staff. The Act should also maintain the CEWH's independence from Ministerial interference¹¹.

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 water availability for recreational use, 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 order to achieve the objectives of the Act, the Basin Plan and the SDLs, the following 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 are essential and must 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 requires strengthening to include a statement 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).

3. ToR 1)a)iii) - Are targets in the Basin Plan being met?

¹⁰ 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

¹¹ Act s 107

Schedule 7 of the Basin Plan sets targets for pre and post 2019. Targets for pre 2019 are “no loss of or degradation in” various parameters – considering that the period since the making of the Plan has been relatively wet with naturally high flows in most river systems, it is not possible to assess the influence of the BP in meeting its targets.

4. ToR 1)a)iv – Is water trading occurring efficiently and effectively?

Effective trading is being limited by the withdrawal of the Commonwealth from the water market. While there was much criticism Commonwealth water purchase, the fact remains that every single tender in the southern basin was oversubscribed and many irrigators took advantage of the tenders to increase business flexibility and retire debt¹². The current focus on infrastructure is limiting options for irrigators and may have perverse outcomes.¹³

5. ToR 1)a)v – are other key elements of the Basin Plan being implemented?

The National Water Commission has laid out clear expectations for progress in implementing the Basin Plan, and has published a pathway to 2015 and beyond.¹⁴ Delays in signing the intergovernmental and implementation agreements means that consensus between parties is yet to be tested. The governance issues that support the BP are crucial to successful implementation – so long as there continues to be friction between the parties the success of the Basin Plan is not assured. All parties including the Commonwealth need to maintain and prioritise their commitment to implementing the Basin Plan on time and in full and make sure they have a common vision of what that Plan looks like, rather than continually reinterpreting it to meet their own requirements.

The MDBA has met milestones set out in the Basin Plan, for example the publication of the Constraints Management Strategy on time in November 2013, and is on track to complete the Environmental Watering Strategy by November 2014. The states are focussing on supply projects for the SDL adjustment mechanism without a comparable focus on efficiency projects or constraints remediation. While this remains the case the SDL adjustment is likely to result in reduced environmental water recovery rather than increased environmental outcomes.

Strengthening indigenous provisions

The National Water Initiative requires all jurisdictions, including the Commonwealth, to provide for indigenous access to water resources.¹⁵ These requirements were not included in the Water Act 2007, which has only one requirement to ‘have regard to’ Indigenous issues among a long list of

¹² <http://www.environment.gov.au/system/files/resources/63d24e7b-40bf-41ab-9777-eefc6113c967/files/sellers-survey-report.pdf>

¹³ http://theconversation.com/the-latest-murray-darling-plan-could-leave-farmers-high-and-dry-27450?utm_medium=email&utm_campaign=Latest+from+The+Conversation+for+4+June+2014+-+1695&utm_content=Latest+from+The+Conversation+for+4+June+2014+-+1695&utm_cid=f13488ac05c470b32586f92b95eb7231&utm_source=campaign_monitor&utm_term=The%20latest%20Murray-Darling%20plan%20could%20leave%20farmers%20high%20and%20dry

¹⁴ NWC (2013) Murray-Darling Basin Plan implementation : initial report

¹⁵ NWI clauses 25 (ix) and 52-54.

other considerations, and one requirement to set up an Indigenous consultation committee.¹⁶ 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 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. 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 developing the cultural flows concept 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.

6. ToR 1)c) – Is water being used in higher value uses?

There is little information available on this topic. However the Commonwealth's survey of water sellers indicates that those who have sold water to the Commonwealth are remaining in irrigation and in profitable business, so presumably their remaining water is being used for higher value uses. The Gross Value of Irrigated Agriculture (GVIA) continues to grow across the Basin despite environmental water recovery¹⁷ and predictions of a production disaster due to the Basin Plan have not been substantiated.

7. ToR 2(a) - Is the Act achieving its objects?

The Act is still in the early stages of implementation and it is impossible to tell whether its objectives are being met. However, we have had serious and ongoing concerns throughout the development and implementation of the Basin Plan that the objectives of the Act will not be met.¹⁸ These concerns include:

- The management objectives set out in Part 5 of the Basin Plan do not reflect the objectives of the Act.¹⁹
- The SDLs in the Basin Plan do not adequately reflect an ESLT as envisaged in the Act²⁰ because the ESLT as defined in the Act²¹ was never calculated. What the MDBA calculated as

¹⁶ Act s 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.

¹⁷ <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4610.0.55.008main+features42011-12>

¹⁸ Environment Victoria has previously submitted on these issues

¹⁹ 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>

²⁰ Act s 23 (1)

²¹ Act s4

an ESLT was heavily influenced by the Authority's view of social and economic factors²² and was in essence a political compromise to allow the Plan to be made.

- The decision to significantly increase groundwater extraction via the SDLs does not reflect best available science and the precautionary principle.²³
- The SDL adjustment mechanism does not accord with the requirement to deliver an ESLT and best available science, and allows opportunities for further compromises and trade-offs.²⁴

Since the Basin Plan is not due to be fully operational until 2019, there is still time to address many of these issues, particularly if the points raised elsewhere in this submission are attended to. 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 CEWH are all crucial to the success of the Plan and the Act meeting its objectives.

The disbanding of the National Water Commission is likely to have a severe impact on the success of the Basin Plan in meeting its objectives. Independence is an essential feature in water reform and the audit function of the NWC was an important component. It is necessary that this function be taken by another independent agency, rather than being abandoned in the interest of reducing red tape. Similarly the role played by the Bureau of Meteorology in providing independent water information is vital to successful implementation.

Finally the independence of the MDBA itself is of critical importance. The reason it was established through the Act in the first place was to provide an independent view among competing interests. That status must continue to allow the MDBA, particularly to implement the parts of the Plan no-one else is much interested in such as constraints management and Indigenous engagement.

8. ToR 3 – Future review of the Act and the Basin Plan

It is not necessary for the Act itself to include a further statutory review point. Most legislation does not include a requirement for review. An appropriate point for review of the Basin Plan may be 2024, once the SDLs are in place and all water recovery is complete.

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²² MDBA ESLT report

²³ 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.

²⁴ 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>