

# Australian Network of Environmental Defender's Offices



Australian Network of Environmental  
Defender's Offices Inc

## Submission to the statutory review of the *Water Act 2007* (Cth)

9 July 2014

The Australian Network of Environmental Defender's Offices (**ANEDO**) consists of independently constituted and managed community environmental law centres located across Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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## Introduction

The Australian Network of Environmental Defender's Offices (**ANEDO**) welcomes the opportunity to comment on the statutory review of the *Water Act 2007* (Cth) (**Water Act**).

We note that the purpose of the review is to consider the progress made towards achieving the objectives of the Water Act since its commencement in 2008.<sup>1</sup> The terms of reference for the review note that:

*The key features of the (Water) Act include establishing: the Murray-Darling Basin Authority (MDBA), a national framework to manage Basin water resources, including through the adoption of the Basin Plan, and the Commonwealth Environmental Water Holder. The Act also provided for water charge and market rules to be developed and for national water information to be provided.*<sup>2</sup>

ANEDO continues to strongly support the framework and objects of the Water Act, which are essential to protect, conserve and restore the long term health and sustainability of the Murray Darling Basin (**MDB**). The Water Act represents the first federal legislative acknowledgment of the importance of integrated and sustainable water management and use, particularly across transboundary water resources in Australia. Of most significance is the Act's requirement that a Murray Darling Basin Plan (**MDBP**) be implemented to ensure the sustainability of the MDB resource. The Act also provides for important institutional capacity through independent authorities, the Murray Darling Basin Authority (**MDBA**) and the Commonwealth Environmental Water Holder (**CEWH**). The ongoing role and independence of these authorities is vital to delivering on the Water Act's objectives in accordance with best available science.

However, ANEDO remains concerned that, in light of insufficient allocation of environmental water and increasing limitations placed on the implementation of a number of the key features of the Water Act, the objective to *protect, restore and provide for the ecological values and ecosystem services of the MDB (specifically accounting for the wetland biodiversity contained therein and the affect that water extraction will have on it)*,<sup>3</sup> may not be achieved.

In making this submission to the Water Act review, ANEDO limits our comments to the Terms of Reference that relate to issues that ANEDO has previous highlighted in relation to the Water Act. In doing so, this submission reiterates a number of concerns raised by ANEDO in previous submissions on the subject of water law reform as regards the Water Act and MDBP.<sup>4</sup>

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<sup>1</sup> *Water Act 2007* (Cth) s 253.

<sup>2</sup> Terms of Reference for 2014 Review of the Water Act 2007

<sup>3</sup> *Water Act 2007* (Cth) s 3(d)(ii).

<sup>4</sup> ANEDO, 'Submission to Senate inquiry into Provisions of the Water Act 2007' ([March 2011](#)); ANEDO, 'Submission on the proposed Murray-Darling Basin Plan' ([April 2012](#)); ANEDO, 'Submission – Senate Standing Committee on Environment and Communications: Water Amendment (Long Term Average Sustainable Diversion Limit Adjustment) Bill 2012' ([October 2012](#)); ANEDO, 'Re: Environmental Water Recovery Strategy for the Murray-Darling Basin (Recovery Strategy)' ([28 February 2013](#)).

As a preliminary comment we note that when setting a review date of 2014, the Water Act envisaged that the implementation of components of the Water Act, such as the reduction in consumptive use water required to achieve Sustainable Diversion Limits (**SDLs**), would be further advanced than is currently the case. As such, this review of the Water Act must recognise that the benefits that will arise from the key features of the Water Act are still being realised.

## Terms of Reference 1

### 1. a) i) Are the management objectives and outcomes of the Basin Plan being met?

Fundamental to the question of whether the management objectives and outcomes of the Basin Plan are being met is whether sufficient water has been committed to the environment to meet the objectives of the Water Act.

ANEDO reiterates our previous concern that the *Guide to the Basin Plan* determined that it is desirable to recover between 3000 and 7600 GL/yr of water for the environment, but the current MDBP identifies 2750 GL/yr as the quantity of water to be returned.<sup>5</sup> In so doing, short-term economic and social issues were effectively prioritised over the requirements of securing environmental sustainability of the MDB; rather than developing the MDBP in a way that integrates short and long-term economic, environmental and social considerations in accordance with ecologically sustainable development (**ESD**).<sup>6</sup>

ANEDO has consistently argued that 2750 GL does not reflect best available science and to that extent is unlikely to comply with the Water Act or properly implement the Ramsar Convention and Convention on Biological Diversity.<sup>7</sup> Similarly, the environmentally sustainable level of take (**ESLT**) for groundwater of 3334 GL/yr has been developed with little to no scientific justification. Instead, setting the groundwater ESLT relied on factors such as existing planning arrangements and programs to reduce groundwater use to justify an increased take.

We submit that this collective reduction in proposed environmental water directly contradicts the requirements of achieving environmental sustainability and therefore the overall objects of the Water Act. Scientists have argued that greater precautionary measures should be taken in determining the SDL because analysis suggests that the current SDLs are not sustainable. Any consideration of water extraction limits as part of this review must improve, rather than reduce, environmental outcomes. In this case that would involve increasing the amount of water available for the environment. Without water extraction limits that reflect an ESLT, enacted by environmentally appropriate SDLs, the objects of the Water Act cannot be realised.

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<sup>5</sup> *Guide to the Basin Plan* (note that 3000GL/yr was the minimum volume required, but up to 7000 GL/year was desirable).

<sup>6</sup> See *Water Act 2007* (Cth), ss 3(d), 4(2) and 21(4).

<sup>7</sup> ANEDO, *Submission on the Environmental Water Recovery Strategy for the Murray-Darling Basin (Recovery Strategy)* (February 2013), available at: [www.edo.org.au/policy/ANEDO%20submission%20Water%20Recovery%20Strategy%2028022013.docx](http://www.edo.org.au/policy/ANEDO%20submission%20Water%20Recovery%20Strategy%2028022013.docx)

We also note that ‘*The Basin Plan... must be prepared so as to provide for giving effect to relevant international agreements*’ (s 21(1)), including the Ramsar convention on wetlands of international importance (s 21(3)). We note that delivery of adequate environmental water to water dependent ecosystems is the principal means of discharging Australia’s international obligations under these treaties. In addition, this section explicitly invokes the principles of ESD<sup>8</sup> and the use of best available scientific knowledge and socio-economic analysis.<sup>9</sup> We submit that at the current extraction limits the MDBP is likely unable to meet the objective of giving effect to relevant international agreements<sup>10</sup> because sufficient water is not reserved for Ramsar-listed significant wetlands.

1. a) ii) Are the long-term average sustainable diversion limits being met?

In its submission on the *Environmental Water Recovery Strategy for the Murray-Darling Basin*, ANEDO expressed significant concern with the use of adjustment mechanisms, including a cap on surface water buybacks, as the sole ‘recovery path’ to recovering the additional environmental water that the MDBP sets out to reserve between the MDBP’s commencement and 2016. ANEDO observed in particular that utilising ‘supply measures’ to offset 650GL/yr of environmental water, albeit that must deliver ‘equivalent environmental outcomes’, was an ‘entirely innovative approach to environmental water management’ with ‘no precedent either locally or globally’.<sup>11</sup> In ANEDO’s view, ‘there is accordingly a significant level of risk associated with pursuing this strategy in the absence of any clear evidence that it is physically and legally possible to account for 650 GL of offsets that must deliver “equivalent environmental outcomes” by 2016’. The introduction of the adjustment mechanism has the potential to directly contradict the basis on which the MDBP is made, which requires the use of best available science in determining this limit.<sup>12</sup> It is timely that the Panel addresses significant concerns about the adjustment mechanisms.

ANEDO remains concerned that these recovery strategies will hinder the Government’s ability to meet the SDL targets, and that failure to meet the targets will require an accelerated buyback scheme between 2016 to 2019. In considering progress towards achieving SDLs, ANEDO remains concerned that accelerating buybacks between 2016 and 2019 may undermine efforts to recover the additional 450 GL/year of environmental water intended to achieve the ‘enhanced environmental outcomes’ in the Coorong, Lower Lakes and Murray Mouth and other areas. ANEDO submits that the Water Act review should consider the implementation of a more measured approach that would

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<sup>8</sup> *Water Act 2007* (Cth), ss 4(2) and 21(4): ESD principles include integration of long and short-term economic, environmental, social and equitable considerations; the precautionary principle (see for example, *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133); conservation of biodiversity and ecological integrity as a fundamental decision-making consideration; intergenerational equity; and improved environmental valuation.

<sup>9</sup> *Water Act 2007* (Cth) s 21(4)(a) and (b).

<sup>10</sup> *Water Act 2007* (Cth) s 3(b).

<sup>11</sup> Australian Network of Environmental Defender’s Offices Inc, ‘Re: Environmental Water Recovery Strategy for the Murray-Darling Basin (Recovery Strategy)’ (28 February 2013) [3]

[http://d3n8a8pro7vnmx.cloudfront.net/edonsw/pages/342/attachments/original/1380680342/130228\\_ANEDO\\_Water\\_Recovery\\_Strategy.pdf?1380680342](http://d3n8a8pro7vnmx.cloudfront.net/edonsw/pages/342/attachments/original/1380680342/130228_ANEDO_Water_Recovery_Strategy.pdf?1380680342)>.

<sup>12</sup> *Water Act 2007* (Cth) s 21(4)(b).

involve planning for the plausible possibility that less than 650 GL in offsets will be approved in 2016.

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

As noted previously, given the delay in implementation ANEDO recognises the difficulty in accurately assessing whether targets in the Basin Plan are being met. Of particular note in considering the achievements of any targets are the difficulties attached to assessing the impacts associated with the groundwater SDL. Significantly, monitoring and metering groundwater use for compliance purposes often encounters substantial challenges.<sup>13</sup> This issue is compounded by the proposed repeal of the Water Act provision that requires an independent expert study on groundwater impacts and connectivity prior to approving subsidence mining operations affecting Basin groundwater systems.<sup>14</sup> Removing this section would also reduce the availability of independent studies on the impacts of proposed operations on the Basin, which are often used by stakeholders in responding to Environmental Impact Studies (EIS).

1. d) Progress in the implementation of improved water information systems

ANEDO strongly supports the implementation of improved water information systems, including the National Water Account. In ANEDO's view, projects such as the National Water Account must continue to be expanded to ensure that the community has appropriate access to information that is informing environmental decision making.

## **Terms of Reference 2**

2. a) Is the Water Act effectively able to achieve its objects?

ANEDO submits that the effectiveness of the Water Act is significantly limited by the management decisions being made within the MDBP. The SDLs are not based on an ESLT determined by best available science, as required by the Water Act. The late inclusion of adjustment mechanisms presents further challenges to the appropriate implementation of the Water Act, particularly the potential to make a negative adjustment of up to 5%. The Water Act would more effectively be able to achieve its objects if the MDBP better reflected the best available science on environmental water needs.

## **Terms of Reference 3**

ANEDO strongly supports the development of an appropriate review framework for the Water Act and MDBP. In particular we note 2016 as a key date at which offsets must be assessed and 2019 as the date of implementation of the SDLs.

<sup>13</sup> Cameron Holley and Darren Sinclair, 'Non-urban water metering policy: water users' views on metering and metering upgrades in New South Wales, Australia' (2013) 16(2) *The Australasian Journal of Natural Resources Law and Policy* 101, 104 (and, at 103, observing that these challenges also extend beyond groundwater to the metering of all non-urban water resources).

<sup>14</sup> Water Act s 255AA; see Omnibus Repeal Day (Autumn 2014) Bill 2014 (Cth). This Bill was before the Senate at the time of writing.

## Terms of Reference 4

ANEDO commends the identification of the need for this review to require consultation with state and territory governments and stakeholders. ANEDO reiterates comments made in previous submissions that extensive public consultation on any matter associated with creating, amending or reviewing the MDBP and the SDLs is vital. ANEDO draws specific attention to the need for this and future reviews to engage with indigenous groups, to ensure the biocultural significance of the MDB, and Indigenous environmental management practices, are recognised and respected; and to consider additional ways in which the Water Act can involve Indigenous peoples.<sup>15</sup>

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<sup>15</sup> This should include, but not be limited to, having regard to *Water Act 2007* (Cth) s 21(4)(c)(v); s 22(1); s 202(3)(c) and Sch. 3 cl. 4(4)(e).