



Australian Network of Environmental
Defender's Offices Inc

28 February 2013

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Water Recovery Team
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Dear Sir/Madam,

Re: Environmental Water Recovery Strategy for the Murray-Darling Basin (Recovery Strategy)

The Australian Network of Environmental Defender's Offices (**ANEDO**) welcomes the opportunity to provide comment on the Recovery Strategy. ANEDO has extensive experience advising in respect of water law and policy at both a State and Basin level. Our comments are therefore intended to build on our previous work in this area, including our submissions in respect of the Proposed Basin Plan,¹ the Murray-Darling Basin Ministerial Council s.43A Notice,² the *Water Amendment (Long Term Sustainable Diversion Limit Adjustment) Bill 2012 (Adjustment Mechanism Bill)*³ and the *Water Amendment (Water for the Environment Special Account) Bill (Special Account Bill)*.⁴ By way of background, ANEDO also appeared before the Senate Environment and Communications Legislation Committee on 8th November 2012 to provide evidence in respect of the Adjustment Mechanism Bill and Special Account Bill.

Our submission will begin by outlining the relevant legislative framework. It will then discuss potential inconsistencies between the statutory requirements and Recovery Strategy.

¹ http://www.edo.org.au/policy/120416mdbdraft_plan.pdf

² <http://download.mdba.gov.au/altered-PBP/APBP-EDO-NSW-submission-re-section-43A-response.pdf>

³ http://www.edo.org.au/edonsw/site/pdf/subs/121026anedo_sdl_adjustment_mechanism_bill.pdf

⁴ <http://www.edo.org.au/edonsw/site/pdf/subs/121108ANEDOWaterfortheEnvironmentSpecialAccountBill2012.pdf>

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1. Legislative background

a. Water Act

Recent amendments to the Water Act provided for the inclusion of an ‘adjustment mechanism’ in the Basin Plan. According to the Act, the adjustment mechanism may be deployed to either increase or decrease the ‘reference’ figure of 2750 GL/year (**2,750 GL/year Limit**) by up to five percent.⁵

Further amendments to the Act provided for the creation of a ‘special account’ intended to finance the recovery of 450 GL/year water in addition to the 2,750 GL/year Limit.⁶ Specifically, the account may be drawn on to finance projects including infrastructure upgrades designed to increase water efficiency; the purchase of any water access rights that become available following infrastructure upgrades; and the removal of constraints.⁷

The amending Bill specifies that the \$1.77 billion will be distributed on a yearly basis between 2014 and 2024.⁸ The Bill does not specify what will happen to funds remaining in the special account at the end of the 2024 financial year. Assuming the account is terminated (or no money remains in the account), we may deduce that additional finance will be required to facilitate the purchase of any outstanding volume of water. That is, if 450 GL is not recovered by 2024, extra funding may be required to ensure that the remaining volume of water is recovered. This observation appears to reflect the Commonwealth’s view, with Minister Burke stating in a recent press release that ‘[w]ithout this legislation the money required for the 450 GL could not be guaranteed.’⁹

b. Basin Plan

Chapter 7 of the Basin Plan outlines the circumstances in which the adjustment mechanism may be triggered. Briefly, the Commonwealth or Basin States may nominate either ‘efficiency works’ or ‘supply measures’ for the purposes of increasing or decreasing the reference figure, respectively.¹⁰

Adjustments to sustainable diversion limits (**SDLs**) may only be approved if certain criteria are met. We note that these criteria generally include achieving environmental outcomes (as opposed to merely recovering, or alternatively offsetting, volumes of water). Specifically, ‘supply measures’ must be capable of meeting ‘equivalent environmental outcomes’ (that is, equivalent to the ‘benchmark environmental outcomes’ associated with the 2,750 GL/year Limit) if they are to comply with Chapter 7.¹¹ Second, ‘efficiency measures’ and ‘constraints removal’ financed under the special account are to ‘allow the enhanced environmental outcomes as set out in Schedule 5 to be pursued as compared to the benchmark environmental outcomes.’¹²

⁵ Water Act, s. 23A.

⁶ Water Act, s. 86AA (b). We note that this forms part of the ‘objects’ of the section.

⁷ Water Act, s. 86AD. This section provides for the account to fund other purposes not specified above.

⁸ Water Act, s. 86AG.

⁹ <http://www.environment.gov.au/minister/burke/2013/mr20130207.html>

¹⁰ Basin Plan, Chapter 7, cl. 7.12.

¹¹ Basin Plan, Chapter 7, cls. 7.09 (b), 7.15 (1) (c), 7.17 (2) (a). See also Schedule 6 which outlines the methodology for determining benchmark and equivalent environmental outcomes.

¹² Basin Plan, Chapter 7, cl. 7.09 (e). We note that this forms parts of the ‘objectives’ of Chapter 7.

Finally, we note that the SDLs specified in the Basin Plan take effect from 1 July 2019,¹³ while any adjusted SDLs will apply from 30 June 2024.¹⁴

c. International obligations

It has been argued that the Water Act and by way of corollary the Basin Plan derive the majority of their constitutional validity from the ‘relevant international obligations’, in particular the Ramsar Convention and Convention on Biological Diversity. Thus failure to properly implement these treaties may render the Basin Plan invalid.¹⁵ 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.

2. Potential inconsistencies between legislative requirements and Recovery Strategy

The legal obligations outlined in the previous section are demanding and to that extent justify the development of best-practice policy designed to recover the necessary quantities of water which will in turn procure the required environmental outcomes.

ANEDO submits that best practice requires contemplation of more than one recovery ‘path’ between now and 2016 in order to guarantee compliance with the 2019 SDLs and to ensure that an additional 450 GL can be purchased with funds from the special account by 2024.

We are therefore concerned that the Recovery Strategy has been developed on the assumption that 650 GL/year water will be ‘offset’ through ‘supply measures’, thereby decreasing the purchase of water access rights up to 2016. Specifically,

For the period up to the end of 2015 the Government’s intention is to set the rate of environmental water recovery such that 2100 GL of environmental water would be recovered by 2019 if that rate were to continue. This approach will accommodate the potential for up to 650 GL of SDL ‘offsets’ to be achieved through supply measures.

ANEDO understands that the method for calculating supply contribution outlined in Schedule 6 of the Basin Plan constitutes an entirely innovative approach to environmental water management. We have been informed that there is no precedent either locally or globally.¹⁶ 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 legally¹⁷ possible to account for 650 GL of offsets that must deliver ‘equivalent environmental outcomes’ by 2016.

¹³ Basin Plan, Chapter 6, cl. 6.04 (1).

¹⁴ Basin Plan, Chapter 7, cl. 7.12 (3) (a); 7.21 (2).

¹⁵ Carmody, Emma, The silence of the plan: Will the Convention on Biological Diversity and the Ramsar Convention be implemented in the Murray-Darling Basin, *Environmental and Planning Law Journal*, Vol. 30/1, January 2013, pp. 56-73. Rothwell, DR, International Law and the Murray-Darling Basin Plan, *Environmental and Planning Law Journal*, Vol. 29/4, March 2012, pp. 268-280.

¹⁶ EDO NSW participated in a telephone meeting regarding the Recovery Strategy between the DSEWPaC (represented by Ms. Mary Harwood) and conservation groups on 26 February 2013. The DSEWPaC indicated that the adjustment mechanism was without precedent.

¹⁷ Supply measures must be capable of complying with certain legal requirements outlined in Chapter 7 and Schedule 6. These include a requirement that any downward adjustment maintain ‘equivalent environmental outcomes.’

For example, it may transpire in 2016 that 650 GL cannot be offset, thereby requiring the Commonwealth to accelerate ‘buybacks’ in order to ensure compliance with the Basin Plan’s SDLs by 2019. This would leave only three years to purchase the necessary entitlements, which may prove difficult to achieve. Indeed, failure to do so may result in breaches of the Basin Plan and Water Act. Furthermore, it is arguable that accelerating ‘buybacks’ is contrary to the purchasing policy outlined in the Recovery Strategy. Specifically,

*Water purchasing will be conducted at a steady pace and measured pace to avoid unnecessary disruption to the water market and to provide communities with time to adjust to the new water sharing arrangements under the Basin Plan.*¹⁸

An accelerated ‘buybacks’ scheme operating between 2016 and 2019 would necessarily be undertaken *in addition to* the purchase of entitlements linked to efficiency works designed to deliver the extra 450 GL of environmental water. As a result, the Commonwealth would be required to manage a highly complex, resource-intensive purchasing program in a relatively short period of time.

ANEDO accordingly submits that a more measured approach would involve planning for the plausible possibility that less than 650 GL in offsets will be proposed and approved in 2016. By way of corollary, the Recovery Strategy would need to be amended to increase the projected number of entitlements to be purchased over the next three years. This would also enable the Commonwealth to give appropriate attention to the recovery of an additional 450 GL of environmental water between 2016 and 2024. Indeed, given the uncertainty surrounding the status of the special account post-2024, it is vital that the Commonwealth ensure, to the extent possible, that this water is recovered prior to 2024. In making this statement, ANEDO is mindful of the fact that the additional 450 GL is linked to ‘enhanced environmental outcomes’, most of which are connected to ecosystem health in the Coorong, Lower Lakes and Murray Mouth (CLLMM).

As the Water Act prohibits the compulsory acquisition of entitlements¹⁹ (that is, the vendor must volunteer to sell them to the Commonwealth), there is no evidence that increasing projected ‘buybacks’ over the next three years would cause ‘unnecessary disruption to the market place.’ Indeed, the Recovery Strategy cites the results of a survey conducted in 2011 regarding the impact of ‘buybacks’ on vendors, according to which ‘almost 80 percent said that selling water to the Government had been a positive decision for them.’²⁰

Finally, ANEDO has consistently argued that 2750 GL does not reflect best available science and to that extent is unlikely to comply with the Water Act²¹ or properly implement the Ramsar Convention and Convention on Biological Diversity.²² Nevertheless, we support the development of a rigorous recovery strategy to ensure that this amount will be available by 2019 as required under the Basin Plan. Failure to do so would only increase the likelihood of Australia breaching its international obligations.

¹⁸ Recovery Strategy, p. 5.

¹⁹ Water Act, s. 255.

²⁰ Recovery Strategy, p. 38.

²¹ See EDO Victoria’s legal opinion regarding the Draft Basin Plan:

http://www.edovic.org.au/downloads/files/law_reform/EDO_legal_analysis_of_draft_MD_Basin_Plan.pdf

²² See ANEDO submissions referenced in footnotes 1-4. See also Carmody, Emma, The silence of the plan: Will the Convention on Biological Diversity and the Ramsar Convention be implemented in the Murray-Darling Basin, *Environmental and Planning Law Journal*, Vol. 30/1, January 2013, pp. 56-73.

Conclusions

In summary, ANEDO is concerned that the Recovery Strategy assumes that 650 GL of 'offsets' may be achieved. In the event that this proves untenable, the residual quantity of water will have to be purchased between 2016 and 2019. 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 CLLMM and other areas.

Furthermore, there is a high level of risk associated with this strategy, the most significant aspect of which is the possibility that the necessary water will not be recovered by 2019, as required under the Basin Plan. Failure to recover 2,750 GL by 2019 may have broader legal implications. These include breaching the Water Act and Australia's obligations under the Ramsar Convention and Convention on Biological Diversity.

Recommendation:

ANEDO strongly recommends amending the Recovery Strategy to assume that less than 650 GL of offsets will be proposed in 2016. By way of corollary, we recommend increasing the projected number of entitlements to be purchased between now and 2016.

Please do not hesitate to contact emma.carmody@edonsw.org.au or (02) 9262 6989 if you have any questions regarding our comments.

Sincerely,



Rachel Walmsley
Policy & Law Reform Director EDO NSW
On behalf of ANEDO