



Australian Network of Environmental
Defender's Offices Inc

Submission regarding the Water Amendment (Water for the Environment Special Account) Bill 2012

8 November 2012

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of 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

ANEDO welcomes the opportunity to provide comment on the Water Amendment (Water for the Environment Special Account) Bill 2012. Our comments are intended to build on our previous work in this area, including:

- ANEDO's submission of 16 April 2012 to the Murray-Darling Basin Authority (**MDBA or Authority**) regarding the Proposed Basin Plan (**Basin Plan Submission**);
- EDO NSW's submission of 5 July 2012 to the NSW Office of Water regarding the Proposed arrangements for shepherding environmental water in NSW;
- EDO NSW's submission of 23 July 2012 to the MDBA regarding the Murray-Darling Basin Ministerial Council s. 43A notice; and
- ANEDO's submission of 26 October 2012 to the Senate Standing Committee on Environment and Communications (**Senate Committee**) regarding the Water Amendment (Long Term Average Sustainable Diversion Limit Adjustment) Bill 2012 (**Adjustment Mechanism Bill and Adjustment Mechanism Bill Submission**).

Executive Summary

ANEDO comments and recommendations regarding the Water Amendment (Water for the Environment Special Account) Bill (**Special Account Bill**) are to be read within the context of our broader concerns regarding the Proposed Basin Plan. As noted in our Basin Plan Submission, the Proposed Plan does not return a sufficient quantity of water to the environment to comply with either the Water Act or Australia's international legal obligations, in particular the Ramsar Convention and the Convention on Biological Diversity.

We further note that recent modelling completed by the MDBA indicates that a 3,200 GL/year with relaxed constraints scenario (**3,200 relaxed model**) will still only achieve 66% of the Authority's own environmental targets for the Basin.¹ ANEDO submits that achieving only 66% of designated environmental targets may not be sufficient to uphold either the Act or Australia's international obligations. Further to this point, the 3,200 relaxed model does not take into account groundwater extractions under the Proposed Basin Plan. Thus the overall impacts of surface water groundwater extractions on Ramsar wetlands and biodiversity more generally are not known.²

¹ Wentworth Group of Concerned Scientists, *Does a 3,200 GL Reduction in Extractions Combined with the Relaxation of Eight Constraints Give a Healthy Working Murray-Darling Basin River System?*, October 2012, p. 1. Citing MDBA, *Hydrologic modeling of the relaxation of operational constraints in the southern connected system: Methods and results*, October 2012.

² Wentworth Group of Concerned Scientists, *Does a 3,200 GL Reduction in Extractions Combined with the Relaxation of Eight Constraints Give a Healthy Working Murray-Darling Basin River System?*, October 2012.

Summary of recommendations

1. The Special Account Bill should be amended with a view to achieving the Objects of Part 2AA by “increasing the volume of Basin water resources that is available for environmental use by a **minimum** of 450 gigalitres.”
2. S. 86AD (2) (a), (b) and (c) should be reworded so as to prioritise projects and purchases that meet the greatest number of ecological targets for environmental assets for the least amount of government expenditure.
3. S. 86AD (2) (a) (iv) should be amended to clarify its intent. Please note that ANEDO would not support a version of this section that provides for the expansion of existing dams, or the construction of new dams.
4. S.86AD (2) (c) (ii) should be deleted. Alternatively, it should be amended to explicitly prohibit individuals or corporations who have sold water access rights to the (CEWH) from receiving supplementary payment (that is, compensation) through the Special Account.
5. The Adjustment Mechanism Bill should be amended to clarify that water purchased by the CEWH can contribute to adjustments that increase the “reference limit” (currently set at 2,750GL/year).
6. S. 86AF should be amended to explicitly state that Special Account agreements between the Commonwealth and a Basin State may only be entered into for the purpose of furthering the Objects of Part 2AA.
7. S. 86AG should be amended to provide for funds remaining in the Special Account to be credited to the following year’s budget.
8. The Special Account Bill should provide for regulations that specify the minimum annual recovery of water access rights.

Background

Proposed Basin Plan

ANEDO’s Basin Plan Submission and Adjustment Mechanism Bill Submission both analyse the methodology used by the MDBA to calculate the reduction in Basin-wide sustainable diversion limits (**SDLs**) under the Proposed Basin Plan. In short, we argue that the proposed reduction figure of 2,750 GL/year is based on a mix of socio-economic, environmental and operational factors.³ Accordingly, SDLs for Basin water resources do not reflect an environmentally sustainable level of take (**ESLT**),⁴ as required under the Water Act.⁵

³ ANEDO, Submission: Proposed Murray-Darling Basin Plan, 16 April 2012, p. 11.
http://www.edo.org.au/policy/120416mdbdraft_plan.pdf

⁴ See Water Act, s. 4 (definition of ESLT).

⁵ Water Act, s. 23 (1).

The Water Act further provides that the Basin Plan must be based on best available science.⁶ ANEDO submits that the proposed reduction figure of 2,750 GL/year does not satisfy this requirement.⁷

Finally, the Act stipulates that the Basin Plan must implement the ‘relevant international agreements’ to the extent that they relate to Basin water resources.⁸ Establishing SDLs that reflect an ESLT is arguably the only means of properly giving effect⁹ to these treaties, in particular the Ramsar Convention and Convention on Biological Diversity. As previously indicated, SDLs in the Proposed Basin Plan do not reflect an ESLT. We may therefore conclude that reducing Basin-wide extractions by 2,750 GL/year may result in Australia breaching certain international obligations.¹⁰

Adjustment Mechanism Bill

While the Adjustment Mechanism Bill explicitly states that the adjusted SDL(s) must reflect an ESLT, ANEDO argues that this will not be possible in most circumstances. Our reasons are summarised below.

First, assuming the ‘reference limit’ of 2,750 GL/year is retained in the final Basin Plan, the adjustment mechanism could be used to modify the reduction in SDLs to a minimum of approximately 2,200 GL/year. If SDLs under the 2,750 GL/year scenario will not reflect an ESLT, the same will be necessarily true of a smaller figure.

Second, the adjustment mechanism will be triggered by ‘efficiency measures’ and ‘supply measures’ designed to maintain the level of consumptive use tied to the ‘reference limit’ of 2,750 GL/year. That is, adjustments to SDLs will only be permissible to the extent that they avoid additional socio-economic impacts. As noted by Minister Burke in his Second Reading Speech,

the mechanism must operate on a non-detriment basis...[t]he adjustments would then not be able to weaken the social, economic or environmental outcomes inherent in the Basin Plan.¹¹

An ESLT for a water resource is defined in the Water Act to be the level of take which, if exceeded, would compromise any one of the following components of that water resource: its key environmental assets; key ecosystem functions; productive base; or key environmental outcomes.¹² It is not defined to take into account socio-economic factors. Thus SDLs calculated on the basis of efficiency and supply measures will almost certainly fail to reflect an ESLT.

As indicated in the Adjustment Mechanism Submission, ANEDO does not support an adjustment mechanism that further compromises Basin water resources by increasing SDLs,

⁶ Water Act, s. 21 (4) (b).

⁷ Young WJ et al, *Science Review of the Estimation of an Environmentally Sustainable Level of Take for the Murray-Darling Basin: A Report to the Murray-Darling Basin Authority from the CSIRO Water for a Healthy Country Flagship*, 2011. See also MDBA, *Guide to the proposed Basin Plan*, Volume 1, Overview, 8 October 2010, pp. 125–128.

⁸ Water Act, ss. 3 (b) (objects); 21 (1) (general basis on which Basin Plan to be developed).

⁹ See *State of Victoria v Commonwealth* (1996)138 ALR 129 at 146 for a full explanation of what constitutes ‘proper implementation’ of a treaty.

¹⁰ For a more detailed analysis of likely breaches under the Ramsar Convention, see La Nauze, J and Carmody, E, *Will the Basin Plan uphold Australia’s Ramsar Convention Obligations?*, Australian Environment Review, September 2012.

¹¹ House of Representative, Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill 2012, Thursday 20 September 2012, Speaker: Burke, Tony MP, p. 2.

¹² Water Act, s. 4 (definitions).

that ignores best available science, and that fails to properly implement Australia's international legal obligations.

The aforementioned comments will inform ANEDO's analysis of the Special Account Bill.

Objects and means of achieving objects: s. 86AA

ANEDO strongly supports the objects of the Special Account Bill (**Objects of Part 2AA**), which are consistent with the broader objects of the Water Act.¹³ These objects are:

...to enhance the environmental outcomes that can be achieved by the Basin Plan, as in force from time to time, by:

- (a) protecting and restoring the environmental assets of the Murray-Darling Basin; and*
- (b) protecting biodiversity dependent on the Basin water resources;*

*so as to give effect to relevant international agreements.*¹⁴

We further note that the Objects of Part 2AA are to be achieved by:

- (a) easing or removing constraints on the capacity to deliver environmental water to the environmental assets of the Murray-Darling Basin; and*
- (b) increasing the volume of Basin water resources that is available for environmental use by up to 450 gigalitres.*¹⁵

ANEDO submits that the most effective means of achieving the Objects of Part 2AA is to increase the volume of available environmental water. By way of example, the Authority's own modelling has indicated that if 2,750 GL/year is recovered for the environment, eight out of ten Ramsar wetlands located in the Basin will decline "beyond the limits of acceptable change" mandated under the Ramsar Convention.¹⁶ Analysis of the Authority's modelling for 3,200 GL/year with relaxed constraints (**3,200 relaxed model**) also indicates that nine ecological targets for five Ramsar wetlands will not be achieved, while a further eighteen targets for six Ramsar wetlands will only be achieved at a high level of risk.¹⁷ Furthermore, as the 3,200 relaxed model did not take into account groundwater extractions under the Proposed Basin Plan, the real magnitude of impacts of overall extractions on internationally listed wetlands and biodiversity more generally remains unknown.¹⁸ That is, it may transpire that additional targets for Ramsar wetlands will not be achieved due to the volume of water being extracted from aquifers across the Basin.

On the basis of this evidence, as well as ongoing concerns about water availability under climate change, ANEDO submits that a *minimum* of 450 GL/year of additional water would be necessary to comply with Australia's international legal obligations under the Ramsar Convention, and arguably the Convention on Biological Diversity.

¹³ Water Act, s. 3.

¹⁴ Special Account Bill, s. 86AA (1).

¹⁵ Special Account Bill, s. 86AA (3).

¹⁶ La Nauze, J and Carmody, E, *Will the Basin Plan uphold Australia's Convention Obligations*, Australian Environment Review, September 2012, citing MDBA, *The Proposed "Environmentally Sustainable Level of Take" for Surface Water of the Murray-Darling Basin: Methods and Outcomes*, 2011. See also Ramsar Convention COP 5, Resolution 5.7 regarding the notion of "beyond the limits of acceptable change" for listed wetlands.

¹⁷ MDBA, *Hydrologic modeling of the relaxation of operational constraints in the southern connected system: Methods and results*, October 2012, pp. 104 – 123.

¹⁸ Wentworth Group of Concerned Scientists, *Does a 3,200 GL Reduction in Extractions Combined with the Relaxation of Eight Constraints Give a Healthy Working Murray-Darling Basin River System?*, October 2012.

Recommendation

1. The Special Account Bill should be amended with a view to achieving the Objects of Part 2AA by “increasing the volume of Basin water resources that is available for environmental use by a *minimum* of 450 gigalitres.”

Purposes of the Special Account: s. 86AD

The “Purposes of the Special Account” include:

(2)

- (a) *making payments in relation to projects whose aim is to further the objects of this Part [Part 2AA Objects] by doing one or more of the following:*
 - i. *improving the water efficiency of the infrastructure that uses Basin water resources for irrigation;*
 - ii. *improving the water efficiency of any other infrastructure that delivers, stores or drains Basin water resources for the primary purpose of providing water for irrigation;*
 - ...
 - iv. *increasing the capacity of dams and storages to deliver environmental water to the environmental assets of the Murray-Darling Basin;*
- (b) *purchasing water access rights in relation to Basin water resources for the purpose of furthering the object of this Part;*
- (c) *making any further payments:*
 - i. *in relation to projects whose aim is to further the object of this Part; or*
 - ii. *to address any detrimental social or economic impact on the wellbeing of any community in the Murray-Darling Basin that is associated with a project or purchase referred to in paragraph (a) or (b) or subparagraph (c) (i) so as to offset any such impact;...*¹⁹

We further note that subsection (4) provides that payments from the Special Account may only be made if

the project or purchase is related to an adjustment of a long-term average sustainable diversion limit for the water resources of a particular water resource plan area (or a particular part of those water resources) under section 23A (whether or not the adjustment has been proposed, and whether or not the adjustment has been adopted as an amendment)...

ANEDO supports the Special Account being used to further the (modified) Objects of Part 2AA. However, we are of the opinion that s. 86AD is not appropriately adapted to achieving that end.

First, use of the Special Account to further the Objects of Part 2AA is not grounded in an evidence-based analysis of the most cost-effective means of meeting the greatest number of ecological targets for environmental assets. Specifically, research indicates that buying water access rights is the most cost-effective means of returning water to the environment.²⁰ We

¹⁹ Special Account Bill, s. 86AD.

²⁰ See for example Grafton, R. Quentin, *How to Increase the Cost-effectiveness of Water Reform and Environmental Flows in the Murray-Darling Basin*, Agenda: A Journal of Policy Analysis and Reform, Volume 17, Number 2, 2010, p. 29.

therefore submit that the section be re-drafted to create a hierarchy of projects based on cost-effectiveness/environmental benefit.

Second, ANEDO supports increasing the outlet capacity of dams in order to deliver greater volumes of environmental water to assets across the Basin. However, we are opposed to additional dams being constructed for the purposes of managing these assets.²¹ The Murray-Darling Basin is a highly regulated system, the environmental impacts of which are well documented.²² As such, we submit that further interference be minimised, and that the MDBA develop a suite of alternative mechanisms (including, for example, rules-based management) to overcome potential storage constraints.

Third, ANEDO strongly supports well-funded structural adjustment programs designed to ease Basin communities through periods of transition. However, we are of the opinion that s. 86AD(c) (ii), which pertains to socio-economic offsets, is inconsistent with the purpose of the Special Account Bill. As previously noted, the Objects of Part 2AA are “to enhance the environmental outcomes that can be achieved by the Basin Plan...so as to give effect to relevant international agreements.” We submit that s. 86AD (c) (ii) does not further these objects insofar as it is entirely concerned with socio-economic, as opposed to environmental, outcomes. Rather, it is likely to undermine the Objects of Part 2AA by directing funding away from projects or purchases that would otherwise increase delivery of environmental water to Basin assets.

In the event that a version of this subsection is maintained, we submit that it explicitly prohibit individuals or corporations who have sold water access rights to the CEWH from receiving supplementary payment (that is, compensation) through the Special Account. In 2009, the High Court determined that in purchasing these rights, the CEWH does not acquire property insofar as water is a natural resource to which the Crown may legitimately limit access. Accordingly, vendors of water access rights are not entitled to “just term compensation” in addition to the purchase price.²³ We are therefore of the opinion that the Special Account Bill should at the very least reflect this finding.

Forth, we note that s.86AD (2) (b) provides for the Special Account to be debited for the purposes of purchasing water access rights (or “buybacks”). S. 86AD (4) goes on to note that a “project” or “purchase” must be linked to the adjustment mechanism provided for in s. 23A of the Adjustment Mechanism Bill. As noted in ANEDO’s Adjustment Mechanism Bill Submission, the “criteria” that will trigger an adjustment under s.23A will invariably comprise “efficiency measures” and “supply measures”. That is, s.23A does not contemplate adjusting the “reference limit” (currently set at 2,750 GL/year) upward on account of buybacks. In other words, there is no scope for water access rights purchased with funds from the Special Account to be linked to s.23A. ANEDO accordingly submits that s.23A of the Adjustment Mechanism Bill and s.86AD (4) are inherently incompatible.

Recommendations

1. S. 86AD (2) (a), (b) and (c) should be reworded so as to prioritise projects and purchases that meet the greatest number of ecological targets for environmental assets for the least amount of government expenditure.

²¹ This is feasible under 86AD (2) (a) (iv): “increasing the capacity of dams and storages...”.

²² See for example Maheshwari, B.L. et. al, *Effects of regulation on the flow regime of the river Murray, Australia, Regulated Rivers: Research and Management*, 10: 15–38.

²³ ICM Agriculture Pty Ltd v The Commonwealth [2009] HCA 51.

2. S. 86AD (2) (a) (iv) should be amended to clarify its intent. Please note that ANEDO would not support a version of this section that provides for the expansion of existing dams, or the construction of new dams.
3. S.86AD (2) (c) (ii) should be deleted. Alternatively, it should be amended to explicitly prohibit individuals or corporations who have sold water access rights to the CEWH from receiving supplementary payment (that is, compensation) through the Special Account.
4. The Adjustment Mechanism Bill should be amended to clarify that water purchased by the CEWH can contribute to adjustments that increase the “reference limit” (currently set at 2,750GL/year).

Arrangements to make payments: 86AF

Subsection (2) states:

If a Basin State is granted financial assistance with an amount debited from the Water for the Environment Special Account, the terms and conditions on which that financial assistance is granted are to be set out in a written agreement between the Commonwealth and the Basin State.

Recommendation

1. S. 86AF should be amended to explicitly state that Special Account agreements between the Commonwealth and a Basin State may only be entered into for the purpose of furthering the Objects of Part 2AA.

Amounts to be credited to the Special Account: s. 86AG

ANEDO notes that there is no requirement that the annual funding set out in the table attached to s. 86AG be spent furthering the Objects of Part 2AA. Nor does s. 86AG require unspent monies to be rolled over to the following financial year. ANEDO accordingly submits that the present wording of this section would technically allow all monies set aside under the Special Account to be returned to consolidated revenue.

We note that the “Account is a Special Account for the purposes of the *Financial Management and Accountability Act 1997*”²⁴ (FMA Act). ANEDO has analysed this Act and can find no impediment to rolling over unspent monies in the Special Account at the end of the financial year.²⁵

Recommendation

1. S. 86AG should be amended to provide for funds remaining in the Special Account to be credited to the following year’s budget.
2. The Special Account Bill should provide for regulations that specify minimum annual recovery amounts of water access rights.

For further information, please contact rachel.walmsley@edonsw.org.au

²⁴ Special Account Bill, s. 86AB (2).

²⁵ FMA Act, s. 21.