

31 July 2015

Committee Secretary  
Senate Standing Committees on Environment and Communications  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [ec.sen@aph.gov.au](mailto:ec.sen@aph.gov.au)

Dear Sir/Madam

### Water Amendment Bill 2015

EDOs of Australia welcome the opportunity to comment on the Water Amendment Bill 2015 (**Bill**). We are a network of independent not-for-profit community legal centres that specialise in public interest environmental law.

EDOs have 30 years' experience advising Australian communities on using the law to protect the environment, including advice, casework, education and law reform. These services are fundamental to providing 'access to justice' across the spectrum of federal and state environmental and planning laws.

EDOs of Australia have extensive experience advising on the *Water Act 2007* (Water Act) and Basin Plan. Our law reform and policy work includes submissions responding to the Draft Basin Plan, strategies made pursuant to the Basin Plan, and various amendments to the Water Act.<sup>1</sup>

This submission covers the following seven areas:

1. Inconsistency between Water Act and Basin Plan
2. International agreements underpinning Water Act
3. No definition of Long-term annual average quantity of water
4. Lack of clarity regarding quantity of recovered water
5. Benefits to irrigators of selling entitlements
6. Benefits to the taxpayer of purchasing entitlements
7. Environmental advantages of purchasing entitlements

In summary, EDOs of Australia **do not support** the central purpose of the Bill, namely a proposal to place a 1,500 gegalitre (**gl**) cap on the purchase of water

access licences (**WALs**), subject to specified exceptions. Our reasons are outlined below.

## 1. Inconsistency between Water Act and Basin Plan

The proposed limit on the purchase of WALs may give rise to inconsistencies between the Basin Plan and the Water Act.

As you are aware, the SDLs outlined in the Basin Plan apply from 1 July 2019.<sup>2</sup> These SDLs may change pursuant to adjustment measures approved by 30 June 2016 and operational by 30 June 2024.<sup>3</sup> Some of these projects will be completed by 2019 (and will be reflected in the SDLs that come into effect that year), while others will not.

This essentially means that the Commonwealth will need to make sure it has enough held (or purchased) water available to meet the SDLs until all supply measures are operational in 2024.<sup>4</sup> For example, if by 2019 only 300 GL of supply measure projects are operational, the Commonwealth will need to ensure it has 2,450 GL of purchased water at its disposal. This logic is reflected in clause 3, 'Bridging the Gap', of the 'Intergovernmental Agreement on Implementing Water Reform in the Murray-Darling Basin.' Specifically, subclause 3.2 notes the following:

*Consistent with 6.04, 6.05 and 7.18 of the Basin Plan, the Parties note that if the volume of SDL offsets is less than 650 GL, any shortfall in a jurisdiction's apportioned share of the 2750 GL water recovery target (after taking full account of their committed water recovery projects and their share of SDL offsets) can be purchased in that jurisdiction by the Commonwealth between 2016 and 2019.*

However, the proposed cap (which will remain in place until 2022)<sup>5</sup> may prevent the Commonwealth from purchasing enough water to reduce Basin-wide diversions by the required amount by mid-2019. This would result in an inconsistency between the Act and the Plan, ultimately frustrating the purpose of the latter.

Of further significance is the fact that 'supply measures' are unproven and costly. For example, of the 27 supply measure projects for which a business case has been made, the potential SDL adjustment contribution for 17 is formally classified as 'unknown', while the remaining 10 are listed as contributing 'potentially more than 20 GL a year.'<sup>6</sup> In other words, there is currently no publically available, concrete evidence indicating whether these projects will succeed and what their contribution will finally be.

Hence, another entirely plausible scenario is that technical difficulties or budgetary constraints will mean that actual water savings will be less than projected savings. Again, the Bill will have the unfortunate consequence of preventing the Commonwealth from remedying the subsequent shortfall by purchasing WALs.

Finally, the Basin Plan provides that Basin States may claim that they have a 'reasonable excuse' for exceeding the mandated SDLs due to circumstances beyond

their control (with these circumstances including the Commonwealth failing to achieve the SDLs for a water resource unit).<sup>7</sup>

As the 1,500 GL cap may constitute a 'reasonable excuse', States may be justified in exceeding SDLs until the Commonwealth is able to provide additional water from supply measures. Furthermore, States may legitimately avoid taking proactive measures (such as changing allocations) to make up for any deficit in Commonwealth water.

As a consequence, this Bill may prevent the Commonwealth fulfilling its promise to deliver the Basin Plan 'on time and in full.'

## **2. International agreements underpinning Water Act**

EDOs of Australia's submission responding to the Draft Basin Plan provided a thorough analysis of the treaties underpinning the Water Act, and the requirement that these be properly implemented under the Plan.<sup>8</sup>

To summarise, there is considerable doubt as to whether the obligations contained in the Ramsar Convention and the Convention on Biological Diversity will be properly implemented under a 2,750 GL scenario. By way of example, modelled outcomes for 10 Ramsar-listed wetlands in the Basin indicate that reducing SDLs by 2,750 GL would likely result in eight of these wetlands declining beyond the 'limits of acceptable change' mandated under the Ramsar Convention.<sup>9</sup>

The environmental consequences of limiting the purchase of entitlements to 1,500 GL remain unknown. As such, it is possible that this Bill will further undermine Australia's capacity to meet its obligations under these Conventions, in particular the Ramsar Convention.

In short, we are deeply concerned that the Commonwealth is considering passing legislation that may prevent it from honouring its international legal obligations.

## **3. No definition of long-term annual average quantity of water**

In the first instance, EDOs of Australia remains critical of using a long-term annual average (**LTAA**) to calculate environmental water.

Notwithstanding this objection, we note that neither the Bill nor the Act define 'LTAA of water'. According to the Department of Environment (**DOE**), the current method involves 'using the Department's estimates of long term annual average yields, as advised in the Murray-Darling Basin Ministers' Communiqué of 4 November 2011' (**Communiqué**).<sup>10</sup> We wish to make two comments in relation to this statement.

First, we have read the Communiqué and can find no mention of the method used to calculate the LTAA of water. As such, we request clarification regarding the statement on the DOE website, in particular when and why the LTAA yield method was chosen to measure the quantity of environmental water purchased by the Commonwealth.

Second, regardless of the contents of this Communiqué, this method is not prescribed by legislation. It is therefore unclear whether the Commonwealth will use this or another method to determine the LTAA of water for the purposes of this Bill. Should the Commonwealth exercise its discretion and use a different method to calculate the LTAA of water, the current recovery figure (which also requires clarification, as noted below) and the remaining (unpurchased) quantity of water could potentially change. This is problematic insofar as it creates uncertainty, and may be prejudicial to the environment.

While we opposed this Bill, should it be passed we recommend including a clear definition of LTAA that provides the best possible outcome for the environment.

#### **4. Lack of clarity regarding quantity of recovered water**

It is unclear how much water has actually been recovered through the purchase of entitlements. As such, it is uncertain how much more water may be recovered through 'buybacks', or whether the 1,500 GL cap has already been reached.

On the one hand, the DOE website states that approximately 1,162 GL of water has been recovered pursuant to the 'Restoring the Balance in the Murray-Darling Basin Program.'<sup>11</sup> On the other hand, the Commonwealth Environmental Water Holder's website states that total environmental water holdings for the Murray-Darling Basin are approximately 1,575 GL.<sup>12</sup> Both are measured in terms of LTAA yield and are current as of 31 May 2015. We assume that both figures include groundwater allocations, which are not affected by the Bill.

The quantity of surface water that has been recovered and is affected by the Bill must be clarified as a matter of urgency. Without this information, it is impossible to properly assess the potential impacts of the Bill. For example, to what extent would Basin-wide annual watering priorities be compromised if the cap has already been reached, particularly as supply measures are not required to be finalised until 2024?

#### **5. Benefits to irrigators of selling entitlements**

Opposition to the purchase of entitlements by the Commonwealth is based on the hypothesis that irrigators are negatively impacted by these sales. Our research and analysis indicates that a number of the assumptions underpinning this theory are ill-founded. Our findings are outlined below.

##### ***No statutory obligation to sell entitlements***

We note that the Water Act explicitly prohibits the compulsory acquisition of WALs.<sup>13</sup> To that end, the holder of a WAL is under no obligation to sell their entitlement. Rather, all sales are voluntary and presumably undertaken after fully considering the potential advantages and disadvantages of doing so. Introducing a 1,500 GL cap will undermine the inherent flexibility of this system, and arguably disadvantage farmers who stand to benefit from selling their entitlements.

### ***Research indicates positive outcomes associated with sale of entitlements***

Further to this point, a 2012 report prepared by Marsden Jacob Associates entitled 'Survey of water entitlement sellers under the *Restoring the Balance in the Murray-Darling Basin Program*' made a number of key findings. These include the following:<sup>14</sup>

- Almost 80% of surveyed irrigators indicated that the decision to sell water had been 'positive for them', including 30% who said the decision had been 'very positive' for them;
- Almost 50% of irrigators who sold part of their entitlement and continued farming said selling water 'had no consequences for farm production.'
- Almost 30% who sold all of their entitlement and continued to farm said that selling water had 'no consequences for farm production.'
- Most of the surveyed irrigators who sold all of their entitlement and exited farming continued either working in the region (51%) or retired in the region (35%).
- There is little evidence that banks directly forced irrigators to sell water. Rather, the 'survey results suggest that irrigators made the decision to sell by themselves, in consultation with family and advisors taking into account their assets and liabilities, uncertainty about future water availability, and other factors.'

### ***Entitlements have created new assets and wealth***

The relatively recent decision to unbundle water entitlements from land has created an entirely new asset which has in turn generated additional wealth for many landholders. That is, water markets have provided farmers with an income-generating option which simply did not exist prior to the introduction of the *Water Management Act 2000* (NSW) and equivalent interstate legislation. For example, we have been advised that many irrigators took advantage of the new market and sold their permanent entitlements at high prices, choosing to instead rely on temporary water (which is cheaper).

## **6. Benefits to the taxpayer of purchasing entitlements**

Research indicates that buying WALs is the most cost-effective means of returning water to the environment.<sup>15</sup> Specifically, the Productivity Commission found that:

*...the Australian Government may pay up to four times as much for recovering water through infrastructure upgrades than through water purchases. In other words, a premium of up to \$7500 ML may be paid for recovering water through infrastructure upgrades...<sup>16</sup>*

This means that the Federal Government's recent decision to reduce funding for the purchase of water entitlements by \$22.7 million over two years<sup>17</sup> could cost the taxpayer up to \$88 million in any infrastructure projects required to recover the equivalent volume of water.

We therefore strongly recommend that the Committee thoroughly investigate the budgetary consequences of the Bill.

## 7. Environmental advantages of purchasing entitlements

It is our understanding that irrigation upgrades do not necessarily mimic the environmental outcomes associated with the purchase of WALs. For example, there is some doubt as to whether the water savings associated with these upgrades is capable of contributing to the medium and large flood events needed to restore certain environmental assets and more generally to maintain a healthy, working river.<sup>18</sup>

Similarly, while the Basin Plan requires supply measures to achieve 'equivalent environmental outcomes' within the 'limits of change',<sup>19</sup> we note that these measures are as yet unproven and will nonetheless result in the river system as a whole receiving less water. As the success of supply measures is in part based on a spatial rationalisation of environmental outcomes, they will also result in tradeoffs. That is, good environmental outcomes in one area will 'compensate' for less favourable outcomes in another.

As modelling has only been completed for seven possible supply measure projects,<sup>20</sup> it remains unclear which ecological targets set for hydrologic indicator sites across the Basin will be met, and which will be compromised as part of this process. As previously indicated, it also remains unclear whether the 1,500 GL cap will compromise the ecological character of any of the 16 Ramsar wetlands located in the Basin.

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<sup>1</sup> Our submissions are available online at: <http://www.edo.org.au/water1>

<sup>2</sup> Basin Plan, cl. 10.11.

<sup>3</sup> Basin Plan, cll. 7.10, 7.11, 7.20, 7.21.

<sup>4</sup> We note that the compliance methodology outlined in the Basin Plan does allow for annual permitted take to be exceeded by 20% in a water accounting year (Clls. 6.09-6.12).

<sup>5</sup> Bill, s. 85C (2); Water Act s. 50 (5).

<sup>6</sup> <http://www.mdba.gov.au/sites/default/files/BOC-MDBA-work-program-May-2015.doc?123> (accessed 24 July 2015).

<sup>7</sup> Basin Plan, cl. 6.12 (4) (b).

<sup>8</sup> [http://d3n8a8pro7vnmx.cloudfront.net/edonsw/pages/1406/attachments/original/1398406115/120416-mdbdraft\\_plan.pdf?1398406115](http://d3n8a8pro7vnmx.cloudfront.net/edonsw/pages/1406/attachments/original/1398406115/120416-mdbdraft_plan.pdf?1398406115)

<sup>9</sup> See environmental water requirements for the 10 Ramsar-listed wetlands: <http://www.mdba.gov.au/what-we-do/basin-plan/development/bp-science/assessing-environmental-water-requirements> (accessed 23 July 2015).

<sup>10</sup> <http://environment.gov.au/water/rural-water/restoring-balance-murray-darling-basin/progress-water-recovery> (accessed 23 July 2015).

<sup>11</sup> <http://environment.gov.au/water/rural-water/restoring-balance-murray-darling-basin/progress-water-recovery> (accessed 23 July 2015).

<sup>12</sup> <http://www.environment.gov.au/water/cewo/about/water-holdings> (accessed 23 July 2015).

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<sup>13</sup> Water Act, s. 255.

<sup>14</sup> Marsden Jacob Associates, *Survey of water entitlement sellers under the Restoring the Balance in the Murray-Darling Basin Program: Final report prepared for the Department of Sustainability, Environment, Water, Population and Communities*, June 2012, p. ii.

<sup>15</sup> 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.

<sup>16</sup> Productivity Commission, *Market Mechanisms for Recovering Water in the Murray-Darling Basin*, *Productivity Commission Research Report*, March, 2010, p. 129.

<sup>17</sup> 2015 Budget, Part 3, Capital Measures: Environment. Available at: [http://www.budget.gov.au/2015-16/content/bp2/html/bp2\\_capital-02.htm](http://www.budget.gov.au/2015-16/content/bp2/html/bp2_capital-02.htm) (accessed 23 July 2015).

<sup>18</sup> At the *Water Law and Policy 2012 Conference* held at the Australian National University on 7 December 2012, Dr Richard Davis expressed his concern regarding the methodology outlined in Sch 6 of the Basin Plan. He noted that on-farm irrigation upgrades could result in small, ongoing water savings which he likened to a “drip.”

<sup>19</sup> Basin Plan, Schedule 6.

<sup>20</sup> Six projects that form part of the Living Murray Works, and the Hume Dam airspace management project. Source: MDBA briefing on the SDL Adjustment Mechanism, Sydney, 16 July 2015.