

Water Amendment (Review Implementation and Other Measures) Bill 2015
Briefing Note
18 February 2016

Executive summary

The *Water Amendment (Review Implementation and Other Measures) Bill 2015* (Bill) essentially seeks to implement the recommendations outlined in the Report of the Independent Review of the Water Act 2007 (Cth).¹ This briefing note outlines some of the key changes proposed in the Bill.

Please note that the Bill has been referred to the Senate Standing Committees on Rural and Regional Affairs and Transport (**Committee**). The Committee is conducting an inquiry into the Bill and is calling for public submissions by 25 February 2016.²

Key amendments

1. Reviews

- The mandatory content of the Basin Plan currently includes a monitoring and evaluation program, with 5 yearly review of (a) water quality and salinity targets in the water quality and salinity management plans and (b) the environmental watering plan.³ The Bill adds a third area for mandatory 5 yearly review, namely a review of the social and economic impacts of the Basin Plan.⁴ It adds that the first of each of these reviews to be completed by the end of 2020. As the Basin Plan commenced in late 2012, it is not clear why the first review would be conducted in 2020 (as opposed to the end of 2017).
- The Water Act currently requires the Murray-Darling Basin Authority (**MDBA**) to give advice to the Murray-Darling Basin Ministerial Council (**MinCo**) on the impacts of the Basin Plan 'as soon as possible after the first 5 years after the Basin Plan takes effect' (i.e. as soon as possible after November 2017). The Bill proposes to amend this requirement so that the MDBA must provide this advice by the end of 2020.⁵
- The Water Act currently requires the MDBA to conduct a review 10 years after the Basin Plan takes effect (so in the year following November 2022).⁶ The Bill requires the MDBA to review the Basin Plan in 2026 and provide the Minister with a report of that review.⁷

¹ Available online at: <https://www.environment.gov.au/water/publications/report-of-the-independent-review-water-act-2007>. EDOs of Australia produced a submission responding to this Review. It is available online at:

https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1542/attachments/original/1406008769/140709_Water_Act_2007_review_ANEDO_submission_FINAL.pdf?1406008769

² For further information please see:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/Water_Amend_Bill_2015

³ Water Act, s. 22 (1), item 13.

⁴ Proposed s. 50 22(1), item 13(c).

⁵ Proposed s. 49A(1).

⁶ Water Act, s. 50(1).

⁷ Proposed s. 50 (1) (a).

The review date has therefore been postponed by 4 years. The Government has indicated that this is to provide time to assess the impact of the adjustment mechanism (the reconciliation date is 2024).

- The Bill states that the MDBA must conduct an analysis of the Basin Plan's effectiveness by the end of each financial year, and provide the Minister with a written report within 6 months.⁸ The report must be tabled in Parliament within 15 days and a copy must be given to each member of MinCo. Note that this amendment simply decouples the effectiveness report from the MDBA's annual reporting requirements.
- The Bill states that the review of the operation of the Water Act must be conducted in 2024⁹ (the existing provision states 2014).¹⁰
- The mandatory terms of reference for the review have been removed. The terms of reference that are currently included in the Water are quite detailed and include assessment of whether the SDLs are being met.¹¹ The amended version simply states that the Minister must 'cause to be conducted a review of...the operation of the Act.' It then states that the 'terms of reference are to be determined by the Minister in consultation with the States.'

2. Accreditation of water resource plans

- Currently, water resource plans (**WRPs**) remain accredited for 10 years unless they have ceased to have effect before that time.¹² The Minister may extend the accreditation by up to 1 year (so may remain accredited for up to 11 years).
- Currently, when seeking accreditation of a WRP, the version of the Basin Plan that applies is either of the following:¹³
 - if the proposed WRP is given to the Minister for accreditation within 2 years after the basin Plan first takes effect - the initial Basin Plan; or
 - if the proposed WRP is given to the Minister for accreditation more than 2 years after the Basin Plan first takes effect – then the Plan in force 2 years before the proposed WRP is given to the Minister.
- The Bill makes significant changes to the accreditation provisions.¹⁴
- First, a formal s. 50 review of the Basin Plan¹⁵ that results in an amendment (any amendment) of the Basin Plan is declared to 'affect WRP accreditations.' The implications of this become clearer in the subsequent amending sections.

⁸ Proposed s. 52A.

⁹ Proposed s. 253(1).

¹⁰ Water Act, s. 253(1).

¹¹ Water Act, s. 253(2).

¹² Water Act, s. 64 (1). They may cease to have effect before that time if, for example, the WRP states that it must be reviewed and re-accredited before the 10 year period expires.

¹³ Water Act, s. 56(2).

¹⁴ Proposed s. 56(2).

¹⁵ This will take place in 2026 if the Bill is passed in its current form. Note that a s. 50 review can also be undertaken if so requested by the Minister or all the Basin States – providing certain conditions are met. See s. 50 (2) – (4).

- Second, WRPs cease to have effect at the end of 3 years following amendments that are linked to the s. 50 review. This period can be extended by up to one year.
- Third, the version of the Basin Plan that applies when seeking accreditation of a proposed WRP is as follows:

Report of first s. 50 review	Basin Plan that applies
<p>Report has not been given to Minister</p>	<p>Version in effect two years before proposed WRP given to Minister for accreditation</p> <p style="text-align: center;">Or</p> <p>A version of the Basin Plan nominated by the Basin State, as long as that version:</p> <ul style="list-style-type: none"> i. does not pre-date the version in effect 2 years prior and ii. does not post-date the version in effect when the Minister determines whether the WRP will be accredited <p>In practice this means that if the Basin Plan is amended any time in the 2 years before the Minister determines whether the WRP is accredited, the Basin State can choose that version of the Basin Plan for accreditation purposes.</p>
<p>Report has been given to the Minister</p> <p style="text-align: center;">and</p> <p>Amendments to Basin Plan flowing from Report take effect in the 3 years before the proposed WRP is given to the Minister for accreditation</p>	<p>Version immediately after the amendment of the Basin Plan takes effect</p> <p style="text-align: center;">Or</p> <p>A version of the Basin Plan nominated by Basin States, as long as the version:</p> <ul style="list-style-type: none"> i. does not pre-date the amended version that would otherwise apply (i.e. version amended in the 3 years prior) and ii. does not post-date the version in effect when the Minister determines whether the WRP will be accredited
<p>Report has been given to the Minister in the 3 years prior to the proposed WSP being given to Minister for accreditation</p> <p style="text-align: center;">and</p> <p>Amendments that flow from the report do not take effect during the 3 years prior to the proposed WSP being given to the</p>	<p>Version of Basin Plan in effect immediately prior to the most recent report applies</p> <p style="text-align: center;">Or</p> <p>A version of the Basin Plan nominated by Basin States, as long as the version:</p> <ul style="list-style-type: none"> i. does not pre-date the version in

Minister for accreditation	effect immediately before the most recent report ii. does not post-date the version in effect when the Minister determines whether the WRP will be accredited
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Implications

- It is clear that the SDLs in the Basin Plan will be amended in 2016 (following the first round of adjustments) and again in 2024. It is likely that the SDLs for the Northern Basin will also be amended (upward) in mid-2017. The Basin States will be able to choose – within the context of the constraints outlined above – the version of the Basin Plan with the highest SDLs.
- Furthermore, s. 50 reviews of the Basin Plan may result in the accreditation period for a WRP being significantly shortened.

3. Indigenous representation

- The Bill introduces a number of requirements regarding indigenous representation and knowledge.
- First, the Water Act includes a list of matters that must be included in the Basin Plan. This includes the accreditation requirements for water resource plans.¹⁶ The Bill states that the Basin Plan must now require water resource plans to be prepared ‘having regard to social, spiritual and cultural matters relevant to Indigenous people in relation to the water resources of the water resource plan area...’.¹⁷
- Second, the Act sets out the functions of the MDBA.¹⁸ The Bill proposes to add the following to the list of functions: ‘to engage the Indigenous community on the use and management of Basin water resource.’¹⁹
- Third, the Act provides for the appointment of members of the MDBA (namely a Chief Executive, a Chair and 4 other members).²⁰ To be eligible for appointment as a member, the individual must have expertise in one of the areas listed in the Act. These areas currently comprise: water resource management; hydrology; freshwater ecology; resource economics; irrigated agriculture; public sector governance; and financial management.²¹ The Bill proposes to expand the list of expertise to include ‘Indigenous matters relevant to Basin water resource.’²²
- Fourth, the Act provides for the creation of the ‘Basin Community Committee’ (**BCC**). The BCC must comprise at least one Authority member, 8 representatives who are water users/representatives of water users and an individual with expertise in Indigenous

¹⁶ Water Act, s. 22 (1), item 11; s. 22 (3).

¹⁷ Proposed s. 22 (3) (ca).

¹⁸ Water Act, s. 172.

¹⁹ Proposed s. 172 (1)(a)(i).

²⁰ Water Act, s. 177.

²¹ Water Act, s. 178.

²² Proposed s. 178(3)(h).

matters relevant to the Basin's water resources.²³ The Bill proposes to amend this list so that the BCC must include 'at least 2 Indigenous persons.'²⁴

4. Commonwealth environmental water holder

- Currently, the Commonwealth Environmental Water Holder (**CEWH**) may only use its water holdings to undertake environmental watering in accordance with the environmental watering plan for the Basin (**EWP**). More specifically, the CEWH may only dispose of its water holdings if the water is not needed to meet the objectives of the watering plan and that water cannot be carried over into the following accounting year (note that if water cannot be carried over it is lost).²⁵
- The Bill proposes to make two core changes regarding the CEWH. The first relates to when the CEWH can sell its water, and the second relates to what it can do with the money it makes from selling seasonal allocations.
- First, the Bill provides that the CEWH can sell its water holdings where it 'reasonably believes' that:
 - the water or water holdings are not needed to meet the objectives of the EWP (as is currently the case), and
 - the water cannot be carried over to the next accounting year (as is currently the case), or
 - where the allocation in question is likely to be reduced if the disposal does not occur. This addition means that if the CEWH cannot use the allocation before it is reduced, but someone else can, there is an opportunity to sell.²⁶
- Second, the Bill proposes to expand the functions of the CEWH so that where certain conditions are met,²⁷ they may dispose of seasonal water allocations (but not permanent entitlements) in order to use the proceeds to undertake 'environmental activities'.²⁸ As previously indicated, the CEWH's functions are currently limited to buying and selling entitlements and allocations in order to undertake environmental watering.
- While these 'environmental activities' are not defined in the Bill, it does specify that the CEWH may only dispose of allocations for the purposes of undertaking such activities if he or she 'reasonably believes, at the time of the disposal, that using the proceeds for

²³ Water Act, s. 202.

²⁴ Proposed s. 203(5)(c).

²⁵ Water Act, s. 106. Note that where the CEWH holds water outside of the Basin/any water that relates to an area outside of the Basin, this water may be used to meet the objectives of any plans regarding these areas (as provided for in any regulations). Similarly, the CEWH may also use its water in accordance with any environmental watering schedules (a schedule being an agreement between various parties regarding the use of environmental water in or outside the Basin): ss. 106 (1)(2). However, the CEWH does not currently hold any entitlements outside of the Basin, and no such regulations currently exist. Based on our research, a number of schedules have been created. See for example (in relation to the Ovens River):

<https://www.environment.gov.au/water/cewo/catchment/northern-victorian-rivers/water-use> (Accessed 18 February 2016). A schedule has also been drawn up between the CEWH and SA Government regarding the delivery of water in the CLLMM region in 2015-16. See: <https://www.waterconnect.sa.gov.au/Content/Flow%20Reports/DEWNR/RM-Flow-Report-20160212.pdf> (accessed 18 February 2016).

²⁶ Proposed s. 106(2). Note that the provisions regarding the use of water outside of the Basin/in accordance with any watering schedules have also been maintained.

²⁷ Proposed 106(3)(b),(c).

²⁸ Proposed s. 106(3).

[these] activities' would improve the capacity of the CEWH's water holdings to be applied to meet the objectives of the EWP.²⁹

- Note that the test 'reasonably believes' is not a subjective one.³⁰ At the time the CEWH decides to sell the allocations, there must be some factual basis to their belief that the proceeds of the sale can be used for environmental activities that will improve the capacity of their water to meet the objectives of the EWP.
- However, the Bill does not include a requirement that the CEWH 'reasonably believes' that the activities themselves will improve the capacity of their water to meet the objectives of the EWP. This is a subtle but potentially important distinction.
- The Bill clarifies that 'environmental activities' do not include regulated water charges.³¹ That is, the CEWH does not have to use its funds to pay for these charges.

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²⁹ Proposed s. 106(3)(c).

³⁰ See *Mckinnon v Secretary, Department of Treasury* (2006) 229 ALR 187.

³¹ Proposed s. 106 (4).