NSW EDO
DEFENDING THE ENVIRONMENT
ADVANCING THE LAW

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Water Management Act Amendment Bill 2018
EDO NSW Briefing Note and Key Issues Summary
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This briefing note is divided into the following 12 Parts:

Part 1: Introduction

On 26 July 2017, the NSW Government appointed Mr Ken Matthews to investigate the claims raised on ABC's Four Corners just two days prior. Mr Matthews' resulting reports[1] set out a series of findings and recommendations principally regarding access to information, metering, protection of environmental water, compliance and enforcement in NSW. EDO NSW has consistently supported these recommendations and in particular their implementation through legislation. As such, we welcomed the passage of the *Natural Resources Access Regulator Act 2017* (NSW) on 22 November 2017.The creation of the Natural Resource Access Regulator (**NRAR**) constitutes a significant step forward in the protection of our scarce water resources.

We were similarly pleased by the publication of the NSW Government's 'Water Reform Action Plan' (**WRAP**) in December 2017, which set out a framework for responding to Mr Matthews' findings and recommendations,[2] and by the appointment of a highly qualified taskforce to implement the WRAP.

Notwithstanding these advances, EDO NSW's frame of reference for assessing the appropriateness of the *Water Management Act Amendment Bill 2018* (**Bill**) is first, Mr

[1] Matthews, Ken, *Independent investigation into NSW water management and compliance, Interim Report*, 8 September 2017; Matthews, Ken, *Independent investigation into NSW water management and compliance, Advice on implementation*, 24 November 2017.
[2] https://www.industry.nsw.gov.au/water-reform

Matthews' recommendations (where relevant) and second, our own extensive experience advising on water law and policy at both a State and Basin level. Note that we have not included an analysis of every proposed provision in the Bill.

Part 2: Executive Summary

EDO NSW conditionally supports the Bill – subject to the recommended amendments being made to the specified provisions. Our concerns and recommendations are set out in the body of this briefing note.

Part 3: Access to information

We note that while the *Water Management Act 2000* NSW (**WM Act**) already provides for the creation of a register which contains certain information.[3] The Bill adds to these provisions, stating that regulations 'may' be made in relation to the disclosure of certain information, including the 'the disclosure of information about water allocation accounts of individuals or corporations who hold access licences or approvals under this Act.'[4]

The enabling provision is drafted broadly, which in turn allows for regulations to require the publication of a range of information. Conversely, the fact that there is no mandatory requirement to first, create such regulations and second, for these regulations to include water usage and account balance data, is problematic. Specifically, this is not consistent with Mr Matthews' recommendation regarding the publication of such data which he stated would 'add considerably to overall compliance effectiveness and public confidence in the system because any interested party could satisfy themselves about the compliance of water users.'[5]

In other words, access to this information by the public is a core component of any successful compliance regime. It is also consistent with the sort of information that the community has access to in relation to development applications under the *Government Information (Public Access) Act 2009* (NSW)[6] and environmental protection licences under the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**).[7] Furthermore, records relating to environmental performance held by regulators are routinely made public, including pollution data provided to the Environment Protection Authority under the POEO Act and environmental performance data provided to the Department of Planning and Environment under the *Environmental Planning and Assessment Act 1979* (NSW).

While we understand that the NSW Government is committed to undertaking further consultation in relation to these issues, we are nonetheless of the view that core elements of any legislative framework should be contained in the Act itself, not a regulation. This is in part due to the ease with which regulations can be amended or disposed of by the government of the day in the absence of any real parliamentary oversight (compared to an Act). Given the controversial nature of these reforms, there is a real risk that any improvements contained in regulations could be eroded with little scrutiny at some point in the future.

We therefore **recommend**:

[3] This is contained in the NSW Water Register.
[4] Bill, s. 391B.
[5] Matthew, Ken, *Interim Report*, p. 39.
[6] Under Schedule 5 of the GIPA Act, development applications are deemed 'open access' documents.
[7] POEOA Act, s. 308. Note that this provision is highly prescriptive and does not defer details to the regulations.

- Including a requirement in the Bill that the register include the following information (in addition to the information that is already contained in the NSW Water Register) and capabilities: the identity of the licence holder; usage data for each licence; and appropriate search functions. This is consistent with the amendment in the Bill which *requires* the register to include the details of enforcement actions taken by the NRAR.[8]
- Including a provision in the Bill which allows for the creation of regulations which broadly provide for the publication of additional information in the register. This would allow for further community consultation in relation to the publication of account balance data, which we understand is the most controversial issue under discussion.

Part 4: Measuring and metering

The Bill includes a 'metering equipment provision' which states that it is 'a mandatory condition of a water supply work approval that metering equipment is installed, used and properly maintained in connection with the work.'[9] This is clearly a positive development. However, the Bill also allows for regulations to be made which set out exemptions.

In his Second Reading Speech, the Minister provided some indication of what those exemptions would comprise. Specifically, he stated that any pipe, pump or offtake of 100mm in diameter or greater for surface water and bores of 200mm or greater for groundwater would be metered.[10] We understand that this infrastructure-based threshold was arrived at as a result of modelling undertaken by independent consultants and that this would result in 95% of all water use being metered.

While this is not consistent with Mr Matthews' 'no meter, no pump' requirement, we consider it a considerable advancement, with two reservations. First, given that extensive modelling has already been undertaken to arrive at this formula – and that the Minister has made a commitment to implement the same – it is unclear why it is not being provided for in the Act itself. We accordingly reiterate our concerns (outlined in Part 3) regarding the inclusion of core matters in regulations (rather than the Act). Second, the formula proposed by the Minister would exclude any floodplain harvesting that is not fed through a pipe. However, it would be logical to include a requirement that water diverted through floodplain harvesting be fed through a pipe of 100mm or greater and subsequently metered. This would provide the community with far greater certainty regarding the volumes of water that are being extracted from floodplains.

We therefore **recommend**:

- That the matters referred to by the Minister in his Second Reading Speech are included in Act (that is, the infrastructure based threshold that will result in 95% of all extractions being metered).
- That water diverted from floodplains be metered (this would occur if all such diversions were fed through pipes greater that 100mm in diameter).

Part 5: Trade of IDECs

The Bill provides for the creation and temporary trading of IDECs.[11] EDO NSW has serious reservations about this proposal. These are as follows.

[8] Bill, s. 391B(3) (as provided for in the proposed s.12A of the NRAR Act).
[9] Bill, s. 101A(1).
[10] https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-76716'
[11] Bill, s. 71QA.

- The Bill does not include a parallel requirement to include Total Daily Extraction Limits (**TDELs**) in all water sharing plans for which IDECs have been created and can be traded. To clarify, TDELs for a given management zone (for example) limit the trade of IDECs, thereby preventing a concentration of IDECs in one part of the river system. This in turn protects the environment and downstream users.
- To clarify, EDO NSW **does not support** the creation of tradable IDECs in the absence of a requirement in the Act to create appropriate TDELs in all affected water sharing plans. We note that this is permissible under cl. 12.18 of the Basin Plan (which allows for trading rules which protect the water source).

We therefore **recommend**:

- The Bill should amend the Act to require TDELs to be in place in any water sharing plan for which IDECs have been created and are tradeable.
- TDELs should be consistent with the water management principles provided for in s.5(3) of the WM Act and should be designed to protect water quality.
- All proposed TDELs should be placed on public exhibition to allow the community the opportunity to scrutinise and comment on them. This is particularly important given the vital role they play in protecting the environment and downstream users.

Part 6: Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012 (BD WSP)

The Bill amends the BD WSP by removing clause 52, which sets out a range of requirements in relation to Individual Daily Extraction Limits (**IDELs** – the equivalent of IDECs). It includes two new notes stating that 'Options for imposing TDELs are proposed to be reviewed on or before 1 July 2019' and 'IDELs are to be reviewed on or before 1 July 2019.'

EDO NSW **does not support** the removal of these provisions in the absence of clearly articulated substitute clauses regarding IDELs and TDELs, which should be placed on public exhibition for comment and review by the public. This is of considerable importance given the high level of concern regarding the creation of - and impacts associated with – this particular water sharing plan. In making this comment, we understand that the NSW Government drafted IDELs and TDELs based on authorised pumps as at 2011, which would have been converted into works approvals and nominated works after the BD WSP was passed in October 2012. If the Government does not intend to use these, it should clarify why and set out its proposed methodology for determining and applying IDELs and TDELs as part of any materials placed on public exhibition.

We therefore **recommend**:

- Removing the deletions to cl. 52.
- Amending the note regarding IDELs to state that 'IDELs will be implemented on or before 1 February 2019.'
- Amending the note regarding TDELs to state that 'TDELs will be implemented on or before 1 February 2019.'
- Amending the account management rules to specify that the maximum volume that may be taken in 3 consecutive years under an A, B or C Class licence is 1.5 times (that is, 450%) of the volume permitted under cl. 42(3). We note that this is consistent with the Draft BD WSP.
- Amending clause 35 to require the assessment of the long-term average modelled extractions for current conditions to be undertaken using a model set to represent as closely as possible all water use development, supply system management and other

factors affecting the long-term annual extraction volume from the water source at the time of assessment. In other words, the model must be based on the latest levels of development and latest water sharing plan rules.

Part 7: Uncontrolled flows

The Bill amends and broadens the existing provision concerning 'uncontrolled flows.' We note that 'uncontrolled flows' are not defined in the WM Act but are defined in relevant water sharing plans.[12]

The amending provision allows water that is not currently credited to a holder's account to be taken during an uncontrolled flow event by high security licences, general security licences, floodplain harvesting licences and any other category provided for in the regulations.[13] The relevant water sharing plan 'may' provide for subsequent adjustments to water allocation accounts. The Minister's Second Reading Speech indicates that these amendments allow the following:

> *contaminated water can be captured even when licence holders have an insufficient account balance remaining. This will not be free water. The additional take will be paid back through future water allocations. The management plans will set out the circumstances under which contaminated water can be taken, including when it can be taken and the volumetric limits*.[14]

This is problematic as most runoff from a farm would be polluted, which in turn means it could be captured under this section during an uncontrolled flow. Further:

- It is drafted far more broadly than the Minister suggests.
- The idea of taking water and having it subsequently debited from the relevant account is contrary to the rest of the Act (it is otherwise an offence to take water if from an account that does not have sufficient credit).
- There is no requirement for relevant water sharing plan to ensure that this is debited from the account (due to the use of word 'may').
- It is unclear how the extraction will be measured and then debited at some future point from the relevant account. This is particularly true where the water is taken with a floodplain harvesting licence. This is because there is not, at this stage, a requirement to meter floodplain harvesting.

To clarify, we **do not support** the inclusion of such a broadly drafted amendment to this provision. This is because – amongst other things – it creates considerable scope for water to be extracted without being debited from the relevant account within an appropriate timeframe.

EDO NSW therefore **recommends**:

- Amending the proposed amendments to provide that:

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[12] See for example: Water Sharing Plan for the Macquarie and Cudgegong Regulated Rivers Water Source 2016 in which 'uncontrolled flow' is defined as 'flow, in excess of that needed to meet the environmental provisions of this Plan, basic landholder rights and water orders placed by regulated river (general security) access licences and higher priority access licences in a water source.'

[13] This is considerably broader than the existing provision, which applies to regulated river (high security) and (regulated river) general security licences only.

[14] https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-76716'

    - the water can only be extracted where the holder of the relevant licence can ensure they will have sufficient credit in their account within three months to then allow it to be deducted;
    - the water extracted is metered; and the water this is then deducted from the relevant account within three months; and
- Amending the Bill to including a corresponding offence provision in the Act.

Part 8: Water management plans generally

The Bill modifies the provisions concerning the extension of water sharing plans.[15] Specifically, it requires such an extension to be preceded by a review by the Natural Resources Commission (**NRC**). The review is to assess the 'achievement of, or the failure to achieve environmental, economic and social outcomes.' Assessing generally against these criteria does not have any clear legislative basis. That is, it is not linked to any specific provision in the WM Act.

We therefore **recommend**:

- That the NRC assess water sharing plans against the achievement of, or failure to achieve, relevant matters set out in the WM Act. Notably, these are:
    - the objects of the WM Act (s. 3);
    - the water management principles (s. 5);
    - the requirements of the Basin Plan and Water Act 2007 (Cth) (only applicable to water resource plans in the MDB).

Part 9: Temporary water restrictions

The Bill amends the existing embargo provision so that the 'Minister may impose an embargo for environmental purposes 'subject to any requirements of the regulation.'[16] As the imposition of an embargo is already a discretionary power (that is, the Minister is not obliged to impose such an embargo), it is unclear why additional requirements would be included in the regulations.

We therefore **recommend**:

- Removing the following: 'subject to any requirement of the regulations.'

Part 10: Extreme events

The Bill includes a new provision concerning extreme events in water resource areas within the Murray-Darling Basin.[17] Briefly, in the event of an extreme event, the Minister may suspend the relevant water resource plan and at their discretion make an available water determination which sets out an alternative hierarchy of water distribution (with critical human water needs at the apex of this hierarchy).[18]

While we note that the Basin Plan requires water resource plans to set out how they will deal with an extreme event,[19] it does not include a requirement to suspend water resource plans. Furthermore, it does not require enabling legislation (for example the WM Act) to be

[15] Bill, s. 43A(a).
[16] Bill, s. 324(1A).
[17] Bill, s. 49B.
[18] Bill, s. 60(3A). We note that the definition of 'critical human water needs' is taken from the definition of the same provided for in the *Water Act 2007* (Cth).
[19] Basin Plan, cl. 10.51.

amended for this purpose. As the suspension of water sharing plans during the Millennium Drought contributed to "environmental flows across the basin declin[ing] by about four times as much as reductions in surface water extractions by irrigators,"[20] we are of the view that the public should be consulted about this matter before any amendments are made to the WM Act.

We therefore **recommend**:

- Removing the amendments concerning extreme events and placing any future amendment on public exhibition.

Part 11: Basin Plan and Water Act 2007 (Cth)

The Bill provides for the creation of regulations that could allow NSW to opt out of part or all of the Basin Plan and/or *Water Act 2007* (Cth).[21] While the *Water Act 2007* (Cth) provides for the creation of such 'displacement provisions' by Basin States,[22] they are not mandatory and are not to be construed as furthering implementation of the Basin Plan per se (although we note that there may be circumstances in which they could be legitimately used to deal with an unintended inconsistency between Commonwealth and State water laws). We note that the Commonwealth retains to the right to override 'displacement provisions' – however this is entirely discretionary.[23]

We recommend:

- Removing these provisions to remove any ambiguity regarding NSW's commitment to the Basin Plan.
- If they are not removed, specifying the specific circumstances in which they will be used by the NSW Government.

Part 12: **Compliance Audits**

The Bill includes provisions concerning compliance audits. These provisions allow, amongst other things, a licence holder to undertake an audit. [24] EDO NSW submits that an audit should only be undertaken by a suitably qualified, independent third party.

We therefore **recommend**:

- That the Bill is amended to clarify that a compliance audit may only be undertaken by a suitably qualified, independent compliance auditor.

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[20] R Grafton, J Pittock, J Williams, Q Jiang, H Possingham and J Quiggin, "Water planning and hydro-climatic change in the Murray-Darling Basin, Australia" (2014) 43(8) *Ambio* 1082 at 1084, citing CSIRO, *Water Availability in the Murray: A Report to the Australian Government from the CSIRO Murray-Darling Basin Sustainable Yields Project* (2008).
[21] Bill, ss. 400A, 400B.
[22] Water Act, ss. 250C, 250D. See also this Explanatory Memorandum which accompanied the amendment to the *Water Act 2007* (Cth) that included the displacement provisions:
[23] *Water Act 2007* (Cth), ss. 250C(3), 250D(6).
http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3091_ems_85b60e61-62c1-4222-a86a-8d6132061e90/upload_pdf/320025.pdf;fileType=application%2Fpdf#search=%22legislation/ems/r3091_ems_85b60e61-62c1-4222-a86a-8d6132061e90%22
[24] Bill, s. 326A.