



Environmental
Defenders Office

Submission to the DCCEEW: Delivering the Murray-Darling Basin Plan – *Ideas on how water recovery and efficiency use goals in the Murray-Darling Basin Plan can be met*

3 July 2023

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Water Reform: Public consultation on ideas to deliver the Basin Plan
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Acknowledgement of Country

The EDO recognises and pays respect to First Nations Peoples. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from First Laws so that together, we can protect our environment and First Nations' cultural heritage through Western law. We recognise that their countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

A Note on Language

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. Where possible, we have used specific references. More generally, we have chosen to use the term "First Nations". We acknowledge that not all Aboriginal and Torres Strait Islander peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

RECOMMENDATIONS/“IDEAS”

General

1. Deliver the Basin Plan recovery targets in full, as a matter of priority. Looking for “innovative ideas” to achieve water recovery targets at the 11th hour is a distraction.
2. As a general approach, which is supported by several parts of this submission: Prioritise and support the recovery of actual flows; deprioritise mechanisms that remain speculative or uncertain.

450GL/y target and constraints projects

3. Return to the original scope of allowable projects for the purposes of meeting the 450GL/y target so that projects are no longer constrained to off-farm projects.
4. If the 450GL/y will not be secured by 30 June 2024, ensure that the Water for the Environment Special Account (**WESA**) funds can be utilised beyond this date for that purpose. This recommendation also applies to funding for constraints projects that are not completed by 30 June 2024.
5. Allocate additional funding to enable the full target to be satisfied and constraints projects to be delivered.

Enable and prioritise buybacks to satisfy the Bridging the Gap and 450GL/y targets

6. Utilise the full 1,500GL/y cap on buybacks to progress water recovery more quickly if willing sellers can be found. The environment has been waiting too long.
7. Amend the *Water Act 2007* (Cth) (**Water Act**) to remove, or at least increase, the 1,500GL/y legislative cap on Australian Government buybacks to enable further water recovery from willing sellers.
8. Amend the Water Act to permit buybacks from willing sellers as a mechanism for returning the 450GL/y as an alternative to efficiency measures.
9. For supply measures that are not delivered and/or cannot feasibly be delivered by 30 June 2024, undertake an assessment of the time required to deliver them. For projects that are not feasible and/or cannot be delivered within the very short term (e.g. 1 year), the Australian Government commits to recovering the volumes via purchases from willing sellers as a priority.

Consider whether compulsory acquisition is suitable for some constraints projects

10. Consider whether compulsory acquisition could offer a mechanism for progressing some constraints projects, where necessary and appropriate, as recommended by the South Australian Royal Commission.

INTRODUCTION

EDO welcomes the opportunity to participate in the Australian Government's consultation about how to deliver the *Basin Plan 2012* (Cth) (**Basin Plan**) in full.

Our submission and recommendations are informed by our expertise as water and environmental lawyers. EDO advises a diverse range of clients including First Nations people, irrigators, floodplain graziers, conservation groups and community groups across Australia. Our submission is also informed by our long history of engagement with the implementation and evolution of the *Water Act 2007* (Cth) (**Water Act**) and the Basin Plan. EDO supports a scientifically rigorous, risk-based approach to water management across the Basin.

The Water Act and Basin Plan were developed to respond to a long history of overextraction and to the realisation that extraction levels were unsustainable and threatened Basin dependent ecosystems. As a pathway towards sustainable extraction, implementation of the Basin Plan is unavoidably complex. However, the need for it is clear and, as the information for this consultation intimates, in the face of climate change the importance of delivering the Basin Plan is now more important than ever.

Although we value opportunities to provide input, EDO is troubled by the suggestion that what is needed to deliver the Basin Plan are "innovative ideas". In fact, what needs to be done is already known. In some cases, legislative amendments and policy changes may be necessary or of assistance. However, none of these suggestions could be called innovative or new. The simple message is that the Basin Plan must be delivered in full, with water returned to the environment as a matter of priority.

Once that is done, focus can shift to the Basin Plan review and, as EDO has long argued, the setting of a Sustainable Diversion Limit (**SDL**) that is, in fact, consistent with an Ecologically Sustainable Level of Take (**ESLT**). In doing so, Australia must take proper account of, and measures to insulate the Basin and Basin communities from, the impacts of climate change.

The Recommendations in this submission:

- support the Australian Government to achieve the water recovery targets and achieve Basin Plan flow targets;
- prioritise pathways that have been assessed as offering value for money;
- support best environmental outcomes via prioritising full and rapid implementation of the recovery targets;
- provide the co-benefits embedded in the environmental impacts that the Water Act and Basin Plan set out to achieve at the outset; and
- with leadership by the Australian Government, enable effective implementation across the Basin.

Finally, to note, EDO is encouraged by the Australian Government’s recent water purchasing tender and is hopeful that this is an indication that the Australian Government intends to take practical, effective steps towards returning minimum necessary flows across the Basin as a matter of priority.

Recommendations: General

1. Deliver the Basin Plan recovery targets in full, as a matter of priority. Looking for “innovative ideas” to achieve water recovery targets at the 11th hour is a distraction.
2. As a general approach that is supported by several parts of this submission: Prioritise and support the recovery of actual flows; deprioritise mechanisms that remain speculative or uncertain.

DISCUSSION OF THE ISSUES

The Sustainable Diversion Limit (SDL) is too high and the recovery targets too low

Under the Basin Plan, the “Bridging the Gap” target for recovery of surface water is 2680GL/y.¹

The Water Act requires the Sustainable Diversion Limited (**SDL**), and the recovery targets that flow from it, to reflect an Environmentally Sustainable Level of Take (**ESLT**). However, the South Australian Murray Darling Basin Royal Commission (**Royal Commission**) concluded in no uncertain terms that the “Bridging the Gap” recovery target *does not reflect an ESLT*. In fact, the most likely range of an ESLT-consistent recovery target would be between 3980GL/y-6980GL/y. Notably, that range is based on the information available and considered at that time, which did not include climate change.²

In relation to Groundwater, the recovery target is 38.45GL/y.³ The Royal Commission Report concluded that there was insufficient publicly available information “to provide any confidence” that the groundwater SDL from which the recovery target was calculated was based on the best available science.⁴

In other words, the Basin Plan provides for less than the bare minimum of water recovery to ensure environmentally sustainable levels of extraction. In addition, the environment has now been waiting a decade to receive those less-than-minimum flows. These factors underscore the

¹ This is revised down from 2750GL/y, accounting for the reduction that followed from the Northern Basin Review.

² South Australia, Murray-Darling Basin Royal Commission, *Report* (29 Jan 2019) (**SA Royal Commission Report**), p 55. EDO has consistently argued that the recovery target and the SDL are not consistent with an ESLT, do not reflect best available science, are unlikely to comply with the Water Act, and are unlikely to properly implement the Ramsar Convention and the Convention on Biological Diversity: See e.g. Australian Network of Environmental Defender’s Offices (**ANEDO**), *Submission to statutory review of the Water Act 2007 (Cth)* (9 July 2014).

³ This is the figure as revised down following the Queensland WRP process.

⁴ SA Royal Commission Report, p 66.

critical importance of delivering the Basin Plan water recovery targets in full, as a minimal starting point and as a matter of priority.

The SDL is further compromised by reliance on a speculative program of supply measures that will not be delivered on time

The Bridging the Gap target for surface water was further weakened by the adoption of a “supply measures” package comprising 36 supply and constraints projects that were intended to “offset” against the full recovery target.

As EDO has previously submitted, the use of supply measures to offset environmental water was an “entirely innovative approach to environmental water management” with “no precedent either locally or globally”.⁵ EDO warned that there was no clear evidence that it was physically possible to account for this volume of water, nor that the approach would deliver “equivalent environmental outcomes”. As such, EDO warned that the supply measures strategy raised a significant level of risk.⁶

This position was supported by submissions to, and the final conclusions of, the SA Royal Commission. Observations in the Royal Commission Report included that “[t]here is a possibility of serious adverse ecological impacts as a result of supply measures”, and that there are “real concerns about the environmental benefits of supply measures”.⁷

Some ten years later it is clear that the suite of supply measures will not be delivered by the statutory deadline of 30 June 2024. This comes as no surprise with, for example, the Productivity Commission anticipating delayed implementation in 2018.⁸ At that time, the Productivity Commission recommended that supply projects be reviewed and that those with insufficient benefits or that are not deliverable in a timely way should be discarded.⁹

⁵ See, e.g., Australian Network of Environmental Defender’s Offices, *Re: Environmental Water Recovery Strategy for the Murray-Darling Basin (Recovery Strategy)* (28 February 2013), [3]; ANEDO, *Submission to statutory review of the Water Act 2007 (Cth)* (9 July 2014). *Submission to statutory review of the Water Act 2007 (Cth)* (9 July 2014).

⁶ See e.g. ANEDO, *Submission to statutory review of the Water Act 2007 (Cth)* (9 July 2014); EDOs of Australia, *Submission to the Proposed adjustment to the Sustainable Diversion Limit Adjustment Mechanism* (Nov 2017); (this submission also pointed out that the 37 proposed supply measures did not include an analysis of the likely impacts of climate change on their operation, and subsequent impacts on the environment and entitlement holders); EDOs of Australia, *Submission on Water Amendment Bill 2015 (Cth)* (31 July 2014).

⁷ SA Royal Commission Report, p 57.

⁸ See e.g. , delayed implementation anticipated by the Productivity Commission in 2018: Productivity Commission, *Murray-Darling Basin Plan: Five-year assessment, Inquiry Report* (2018) Finding 4.1. Serious concerns held by the MDBA were also revealed via documents produced to Parliament: EDOs of Australia, *Submission responding to the Productivity Commission’s Draft Report on the Murray Darling Basin Plan Five Year Assessment* (October 2018) p 4.

⁹ Productivity Commission, *Murray-Darling Basin Plan: Five-year assessment, Inquiry Report* (2018) Recommendation 4.4.

In late 2022, the MDBA estimated that the supply measure package will fall short by between 190-315GL/y come 30 June 2024.¹⁰

The 450GL/y target, constraints measures, and the Water for the Environment Special Account (WESA): More money and a change of approach is required

On top of the Bridging the Gap recovery target is the return of an “equivalent” of 450GL/y to the Basin via “efficiency projects”. Following legislative amendments in 2021, the former Water Efficiency Program (**WEP**) was replaced with the Off-farm Efficiency Program (**OFEP**), with the effect of confining suitable projects to Off-Farm efficiency projects.¹¹

Sitting alongside these efficiency measures is the constraints program. Removal of constraints is crucial in order to realise the full environmental benefits of the recovery of the 450GL/y.¹²

The Water Act establishes the Water for the Environment Special Account (**WESA**). WESA sets aside \$1.775 billion in Australian Government funding for the period 1 July 2014 to 30 June 2024 for the purpose of achieving the 450GL/y recovery target (\$1.575bn allocated) and implementing the constraints projects (\$200m allocated).

In 2018, the Productivity Commission found that there was a high risk that the efficiency measures would not achieve the enhanced environmental outcomes within the required time frame, or within the existing budget.¹³

More recently, the second statutory review of WESA made the following relevant findings:¹⁴

- Neither the 450GL of water through efficiency measures, nor the constraints measures, will be delivered by 30 June 2024.
- Even without time and budget constraints, it will not be possible to reach the 450GL/y efficiency measures target through the OFEP. At most, the OFEP could recover 330GL/y. Significantly more volumes (more than 450GL/y) could be recovered if on-farm and stock and domestic projects were eligible.
- The funds set aside are not sufficient to recover the full 450GL/y through efficiency measures; the full costs is between \$3.4bn and \$10.8bn.
- Similarly, the cost of delivering the constraints projects is likely to exceed the total allocated funding from all sources.

¹⁰ MDBA, *Sustainable Diversion Limit Adjustment Mechanism: 2022 Assurance Project* (Nov 2022) p 38.

¹¹ See e.g. *Second Review of the Water for the Environmental Special Account* (Dec 2021) (**WESA 2nd Review**) p 7.

¹² See e.g. SA Royal Commission Report, pp 61, 386.

¹³ Productivity Commission, *Murray-Darling Basin Plan: Five-year assessment, Inquiry Report* (2018) Finding 5.2.

¹⁴ WESA 2nd Review, pp 7-9, 24.

The review also noted that after 30 June 2024, amendments to legislation would be required to continue using the WESA funds towards efficiency or constraints projects.¹⁵

To date, the Australian Government reports that only 26GL/y of water has been recovered or is under contract.¹⁶ The remaining 424GL/y is to be recovered by 30 June 2024.

Recommendations: 450GL/y target and constraints projects

3. Return to the original scope of allowable projects for the purposes of meeting the 450GL/y target so that projects are no longer constrained to off-farm projects.
4. If the 450GL/y will not be secured by 30 June 2024, ensure that the Water for the Environment Special Account (**WESA**) funds can be utilised beyond this date for that purpose. This recommendation also applies to funding for constraints projects that are not completed by 30 June 2024.
5. Allocate additional funding to enable the full target to be satisfied and constraints projects to be delivered.

Efficiency measures vs buybacks

In 2015, amendments to the Water Act applied a 1,500GL/y cap on Australian Government buybacks.¹⁷

The SA Royal Commission specifically considered efficiency measures vs buybacks as a method of recovering water and concluded that:¹⁸

...efficiency measures are a very expensive means of recovering water for the environment. Compared to the cost of purchasing water through buybacks they are an extravagant expense, making them, absent other real benefits, an improvident policy choice by Government for taxpayers.

Similarly,:

Recovering water for the environment through 'buybacks' is considerably less expensive than through irrigation efficiency upgrades... There would need to be compelling reasons to justify the additional public expense of efficiency measures. There are none.¹⁹

¹⁵ Ibid, p 14.

¹⁶ See Australian Government DCCEEW, *Progress on Murray-Darling Basin water recovery*, at <https://www.dcceew.gov.au/water/policy/mdb/progress-recovery> (accessed 30 June 2023).

¹⁷ Water Act, s 85C.

¹⁸ SA Royal Commission Report, p 390.

¹⁹ Ibid, p 61. Earlier work by the Productivity Commission found that buybacks from willing sellers were the most effective and efficient means of recovery water: Productivity Commission, *Market Mechanisms for*

The SA Royal Commission also found that, although “considerable criticism” had followed historical buybacks, this was often misplaced.²⁰ The Report found that the impacts of water recovery have often been overstated, alongside which there has been a “total neglect of the non-market benefits of water recovery”.²¹

The SA Royal Commission concluded that future water recovery – including but not limited to the 450GL/y – should be undertaken largely, if not entirely, through buybacks, finding that “[t]here is no proper justification for the massive additional expenditure on efficiency measures.”²²

In this context it is important to note the importance of buybacks following a strategic approach to ensure that future buybacks do not repeat the history of acquiring low reliability water within the Australian Government’s water portfolio.²³ The Australian Government should only purchase entitlements where it can demonstrate that the purchased water will result in measurable environmental and social benefits, is strategically the best use of taxpayer money, and represents overall value for money.²⁴ As one of several mechanisms for supporting this outcome, EDO has previously recommended that the Commonwealth Environmental Water Holder (**CEWH**) have a concurrence role in relation to the purchase of entitlements.²⁵

The Murray Darling Basin Authority reports that so far the Australian Government has recovered approximately 1,231GL/y through buybacks.²⁶ Thus, there is scope to immediately progress further buybacks up to the cap. Beyond that, legislative amendments to increase or remove the cap would be necessary.

Recommendations: Enable and prioritise buybacks to satisfy the Bridging the Gap and 450GL/y targets

6. Utilise the full 1500GL/y cap on buybacks to progress water recovery more quickly if willing sellers can be found. The environment has been waiting too long.
7. Amend the Water Act to remove or at least increase the 1,500GL/y legislative cap on Australian Government buybacks to enable further water recovery from willing sellers.

Recovering Water in the Murray-Darling Basin (Research Report, March 2010) (RCE 496) p 122; EDOs of Australia, Submission to the Senate Standing Committee on Environment and Communications – Inquiry into the Water Amendment (Purchase Limit Repeal) Bill 2019 (25 February 2019). See also Productivity Commission, Murray-Darling Basin Plan: Five-year assessment, Inquiry Report (2018), which identified that the efficiency program offered a premium of 75% on the market price for entitlements recovered through projects: p 22.

²⁰ See SA Royal Commission report, p 61.

²¹ Ibid, pp 61-62.

²² Ibid, p 63.

²³ This was raised in: EDOs of Australia, *Submission to the Senate Standing Committee on Environment and Communications – Inquiry into the Water Amendment (Purchase Limit Repeal) Bill 2019* (25 February 2019).

²⁴ This is as EDO has previously submitted: EDOs of Australia, *Submission responding to the Productivity Commission’s Draft Report into National Water Reform* (October 2017), p 6.

²⁵ EDOs of Australia, *Submission responding to the Productivity Commission’s Draft Report into National Water Reform* (October 2017), p 8.

²⁶ Murray Darling Basin Authority, *Progress on water recovery*, at <https://www.mdba.gov.au/progress-water-recovery> (accessed 30 June 2023).

8. Amend the Water Act to permit buybacks from willing sellers as a mechanism for returning the 450GL/y as an alternative to efficiency measures.
9. For supply measures that are not delivered and/or cannot feasibly be delivered by 30 June 2024, undertake an assessment of the time required to deliver them. For projects that are not feasible and/or cannot be delivered within the very short term (e.g. 1 year), the Australian Government commits to recovering the volumes via purchases from willing sellers as a priority.

Alternative options to progress constraints projects

We note for the Government's attention, the following observations by Commissioner Bret Walker SC:

For progress to be made with landowners and others who will be impacted by constraint easing or removal, it is likely that the process will have to become compulsory in the national interest. This means, of course, an appropriate acquisition and compensation scheme will need to be put in place. Such a scheme should reflect the well-known concept of 'just compensation', and provide for mediated or arbitrated outcomes.²⁷

Recommendations: Consider whether compulsory acquisition is suitable for some constraints projects

10. Consider whether compulsory acquisition could offer a mechanism for progressing some constraints projects, where necessary and appropriate, as recommended by the SA Royal Commission.

²⁷ SA Royal Commission Report, p 60.