



EDOs of Australia

Submission responding to the Productivity Commission's Draft Report on the Murray-Darling Basin Plan: Five year assessment

10 October 2018

EDOs of Australia (formerly ANEDO, the Australian Network of Environmental Defender's Offices) consists of eight independently constituted and managed community legal centres located across the States and Territories.

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

EDOs of Australia (**EDOA**) welcomes the opportunity to comment on the Productivity Commission's Draft Report on the Murray-Darling Basin Plan: Five year assessment (**Draft Report**).

EDOA is a network of community legal centres specialising in public interest environmental law. We have many years' experience engaging with water law and policy processes at both State and Commonwealth levels. We also have extensive experience advising a broad range of clients on the *Water Act 2007* (Cth), Basin Plan and State legislation and policies. Our work often draws on advice from experts on our technical advisory panel, as well as landholders and irrigators with considerable experience in managing their properties in a variable climate.

EDOA wishes to congratulate the Productivity Commission (**Commission**) on the comprehensiveness of its Draft Report. We support many of the Commission's findings and recommendations and are pleased to see that several are consistent with our own analysis and recommendations. However, we hope that our input will provide the Commission with additional, relevant material which will in turn assist it to finalise its report by the 31 December 2018.

We note that as a statutory review provided for under s. 87 of the *Water Act 2007* (Cth) (**Water Act**), the Commission is required to inquire into the 'effectiveness of the implementation of the Basin Plan and the water resource plans.' The term 'effectiveness' is defined in the Oxford Living Dictionary as the "degree to which something is successful in producing a desired result; success."

As the Basin Plan and water resource plans (**WRPs**) are legislative instruments operating within a specific legal framework, the 'desired result' should arguably start with lawfully made and implemented instruments. Our submission will therefore focus on a range of legal issues identified by this office in relation to the making and implementation of the Basin Plan and the development of WRPs.¹ It will also include recommendations throughout. To that end, it is divided into the following 11 Parts:

1. Water Recovery
2. Supply measures and associated amendments to the Basin Plan
3. Toolkit, Northern Basin Review and associated amendment to the Basin Plan
4. Efficiency measures
5. Constraints
6. Planned environmental water
7. Water resource planning
8. Compliance
9. International legal obligations
10. Floodplain harvesting
11. Governance

¹ Please also see this briefing note which raises some additional legal issues:
https://www.edonsw.org.au/water_amendment_bill_2018

Part 1: Water recovery

We note that Draft Recommendation 3.1 states that the Murray-Darling Basin Authority (MDBA) 'should assess and determine the extent of over-recovery.' Putative over-recovery can be attributed to one of two causes: revised planning assumptions (which are associated with cap factors) and amendments to the Basin Plan which increase sustainable diversion limits (SDLs). We will address each of these in turn.

With respect to the former, we agree with the Commission and certain industry stakeholders that '[t]he process of developing (by Basin States) and accrediting (by the MDBA) cap factors has not been transparent, and delays in finalising cap factors have created additional uncertainty for both water recovery programs and water users.'² On this basis, we believe it is premature for the Commission to recommend that the states and MDBA 'assess and determine the extent of over-recovery.' Rather, the public should be provided with more detailed information regarding the basis for amending cap factors which in turn result in a particular valley being classified as 'over-recovered.' In other words, clarity and rigour with respect to the evidence-base and policy settings is required before any such quantification takes place.

With respect to the latter, we are particularly concerned about the classification of valleys containing Ramsar-listed wetlands as 'over-recovered' as a consequence of the Northern Basin Review and associated amendment to the Basin Plan.³ Specifically, this amendment resulted in 12GL being returned to the consumptive pool in the Macquarie valley and 14 GL in the Gwydir valley.

The decision to classify the Macquarie valley as over-recovered is particularly perplexing, as in 2009 the Australian Government submitted an Article 3.2 notice to the Secretariat of the Ramsar Convention stating that the Macquarie Marshes were likely to experience a change in ecological character. In this notice, the Government indicated that 'the most significant action in place to help respond to the threats currently facing the Macquarie Marshes and other important waterways, is the Australian Government's AUD\$3.1 billion Restoring the Balance in the Murray-Darling Program'. The notice goes on to state that the goal of this Program is to 'acquire water entitlements from willing sellers that represent value for money, and use the water allocated to them for the environment.'

It is therefore unclear how reducing the volume of water available for a *prima facie* vulnerable wetland is consistent with the requirement to 'promote the conservation and wise use' of wetlands, as required under the Ramsar Convention.

Furthermore, the Water Act (and by way of extension, the Basin Plan) derive the majority of their constitutional validity from a suite of environmental treaties to which Australia is signatory, in particular the Ramsar Convention and Convention on Biological Diversity. Failure to deliver sufficient water to a wetland that is listed under the Ramsar Convention on the scientifically dubious grounds that the valley in question is 'over-recovered' undermines the effectiveness of the Basin Plan and involves considerable legal risk. While the extent of this risk may in time be determined by the High Court, we would in the meantime urge the Commission to consider the notion of 'over-recovery' against the legal requirements of the Water Act, including Australia's international obligations.

Finally, we acknowledge the concerns regarding 'real water recovery' raised by Professor Sarah Wheeler et al in their submission responding to the Commission's

² Productivity Commission, *Draft Report, Murray-Darling Basin Plan: Five-Year Assessment*, p. 82.

³ Basin Plan Amendment Instrument (No 1) 2018.

Murray-Darling Basin's Five-Year Assessment Issues Paper. EDOs of Australia strongly supports their recommendations.⁴

Part 2: Supply measures and associated amendment to the Basin Plan

EDOs of Australia notes the Commission's comments regarding supply measures, and appreciates the fact that it acknowledges that the 36 projects remain a source of concern for many stakeholders.

Our office and many of our clients are particularly troubled by the failure by both State and Commonwealth Governments to voluntarily publish business cases, the MDBA's assessments and other third party assessments for each of the 36 supply measure projects. In fact, the MDBA's assessments were only released to the Senate under compulsion (and well after the consultation period had ended), which did little to build trust between the Government and community, particularly given the MBDA's findings.

From a legal perspective, there is no justification for failing to release these documents during the public consultation period, particularly given the significance of the adjustment mechanism and its impact on the ongoing management of a shared natural resource which is likely to diminish over time due to climate change. On the contrary, it is difficult to understand how such a significant amendment to the Basin Plan could have been presented to Parliament with so little information in the public domain for the community to assess and in turn develop an informed view on the subject (including the legality of the proposed projects).

Relevantly, the MDBA's assessment of these projects reveals a variety of serious shortcomings.⁵ The Wentworth Group of Concerned Scientists also undertook a detailed assessment⁶ of each project against 12 conditions⁷ and found only one of the 36 projects met all 12 conditions. There is therefore a **high risk** that these projects will not deliver the projected water savings, that they will result unintended environmental and cultural impacts and that these impacts will be exacerbated by decreased water availability as a consequence of climate change.⁸

EDOs of Australia therefore strongly supports the recommendations made by the Wentworth Group in their report, and note that many of these recommendations have informed the proposed legislative amendments set out in **Annexes 1 and 2**. These amendments are designed to ensure that the final projects comply with the requirements of the Basin Plan and Water Act and to 'guard against obvious risks and avoidable

⁴ https://www.pc.gov.au/__data/assets/pdf_file/0008/227483/sub040-basin-plan.pdf

⁵ See: http://parlinfo.aph.gov.au/parlInfo/download/publications/tables/papers/1c583c50-c828-4334-98f4-db01a74c7a35/upload_pdf/OPD.pdf;fileType=application%2Fpdf#search=%22publications/tables/papers/1c583c50-c828-4334-98f4-db01a74c7a35%22

⁶ Wentworth Group of Concerned Scientists, *Requirements of SDL adjustment projects to ensure they are consistent with the Water Act 2007, Basin Plan 2012, MDBA policies and intergovernmental agreements*, May 6, 2018. Available at: <http://wentworthgroup.org/wp-content/uploads/2018/05/Requirements-for-SDL-adjustment.pdf>

⁷ The 12 conditions are 'needed to ensure that supply measures will deliver "equivalent environmental outcomes with a lower volume of held environmental water than would otherwise be required" (the requirement of section 7.09 in Basin Plan).' Furthermore, '11 of these conditions have been agreed by Basin governments and are sourced from the Basin Plan itself, or policies that have been agreed by Basin governments or adopted by the Authority (see references in Table 1). One further condition (Condition 8) was a recommendation from an independent stocktake of SDL projects commissioned by the Authority in 2015.' Ibid, p. 1.

⁸ See Condition 7. Ibid, p. 3.

failures.⁹ Implementation of these recommendations is particularly important insofar as the *Basin Plan Amendment (SDL Adjustments) Instrument 2017* is unlikely to comply with core requirements in the Water Act, which in turn constitutes a **high risk** to the ongoing effectiveness of the Basin Plan.

As a final point, we wish to note that the Office of Best Practice Regulation was consulted in the preparation of *Basin Plan Amendment (SDL Adjustments) Instrument 2017* and advised that no Regulatory Impact Statement was required because the proposal was minor in nature. It is unclear how the Office arrived at this conclusion given the significance of the amendment and the MDBA's findings for each of the 36 supply measure projects. This matter requires further investigation to ensure that Regulatory Impact Statements are prepared for all future, substantive amendments to the Basin Plan.

Part 3: Toolkit, Northern Basin Review and associated amendment to the Basin Plan

In our submission responding to the Northern Basin Review, EDOs of Australia raised concerns about the lawfulness of the proposed amendment, including in relation to the socio-economic analysis underpinning the proposal. Specifically, we were concerned that this work did not meet the legal threshold for 'best available socio-economic analysis' as specified in s.22(4)(b) of the Water Act.

Documents which were obtained under the *Freedom of Information Act 1986* (Cth) (**FOI Act**) for our client, the Inland Rivers Network, may support our concerns regarding the socio-economic analysis undertaken for the Northern Basin Review.

Our submission also raised concerns regarding the hydrological modelling which was undertaken for the Review. These concerns were elaborated on in a legal opinion dated 16 February 2018 that was published by EDO NSW. In summary, these issues include *inter alia*: meeting only 44% of environmental targets for the Northern Basin under the amendment compared to 49% under the previous iteration of the Basin Plan, with the overall probability for achieving site specific indicators being lower;¹⁰ the fact that the modelling excluded low flow targets on the Barwon-Darling River; the fact that modelled environmental outcomes are dependent on the implementation of 'toolkit measures' which have no statutory basis and which depend on State cooperation; the ability for targeted water recovery, which purportedly reduces environmental impacts, to be varied; and assumptions regarding compliance.

These concerns remain, including in relation to the coordination of environmental flows – and the protection of the same. While we are pleased to see that one such trial has been run in Northern NSW, there are still no statutory measures in place guaranteeing that this will be repeated at the necessary intervals (and with the necessary volumes).

Accordingly, we were and remain concerned that the scientific work underpinning the 70GL reduction scenario and associated amendments (including in relation to increased groundwater diversions) would not meet the threshold for 'best available scientific knowledge' specified in the Water Act. Furthermore, as it appears unlikely that the 390GL/year reduction figure satisfies the requirement that SDLs reflect an environmentally sustainable level of take (**ESLT**), it is difficult to reach a more favourable conclusion in relation to the 320GL/year scenario.

⁹ Ibid, p. 1.

¹⁰ Wentworth Group of Concerned Scientists, *Advice on Basin Plan Amendment Instrument 2017 (no 1)*, 2017, p. 5. Based on SFI results from Appendix A in MDBA 2017, Hydrologic Modelling for the Northern Basin Review – Interim Decision Scenario Addendum November 2017, Murray-Darling Basin Authority, Canberra.

Finally, we are concerned that the consultation process undertaken for the Northern Basin Review was inequitable, with a small number of industry lobby groups privileged over and above all other stakeholders, including many EDO clients physically located in the Northern Basin or with a strong history of involvement in water management processes in the Basin (such as community groups and conservation groups). Evidence to support this claim is contained documents obtained by our client, the Inland Rivers Network, under the FOI Act.

In summary, it is our considered legal opinion that the amendment that was eventually passed by Parliament¹¹ is unlikely to be lawful, which in and of itself poses a **high risk** to the long-term effectiveness of the Basin Plan. We are further concerned that there is a **high risk** that the Toolkit Measures will not be implemented, particularly as they have no basis in law. At the very least, statutory protection for held environmental water must be provided for in relevant WRPs.

Part 4: Efficiency measures

EDOs of Australia notes and supports the issues raised by the Commission with respect to this issue, in particular the risk that the 'enhanced environmental outcomes' will not be achieved if the efficiency measures program is not designed in a prudent manner. Prudent design should take into account the following three matters.

The first concerns the absence of any statutory requirement at the Commonwealth level that independent, third party auditing be undertaken in relation to these projects to ascertain whether contractual obligations are being met.

The second concerns the absence of any statutory obligation – again at the Commonwealth level – to prove that individual projects that are funded with Commonwealth money are saving water and resulting in increased flows in the Murray-Darling Basin (which is their fundamental purpose).¹²

Third, Basin Plan implementation has been typified by policymakers and governments precipitating toward a desired outcome in the absence of a rigorous evidence base which clearly satisfies the legal requirements of the Basin Plan and Water Act (as well as community expectations regarding transparency and access to information). Increasing SDLs in the Northern Basin following the Northern Basin Review and in the Southern Basin following approval of 36 supply measure projects are two such examples. There is therefore a risk that the program design for efficiency measures will focus on reaching a numerical target rather than adopting an integrated approach which considers the most effective means of meeting the outcomes prescribed in Part 2AA of the Water Act.¹³

These issues pose a **high risk** to not only the overall credibility of any efficiency measure program, but its capacity to deliver the 450GL and other Part 2AA outcomes. We therefore recommend that the Commission consider:

- the legislative amendments to the Water Act set out in **Annex 1** to this advice;
- the recommendations of Professor Wheeler et al outlined in the aforementioned submission;¹⁴
- the importance of ensuring that the program results in:

¹¹ Basin Plan Amendment Instrument (No 1) 2018.

¹² We note that the underlying issues (return flows, inadequate water accounting) were covered in some detail in the submission by Professor Sarah Wheeler et al responding to the Productivity Commission's Murray-Darling Basin's Five Year Assessment Issues Paper: https://www.pc.gov.au/__data/assets/pdf_file/0008/227483/sub040-basin-plan.pdf

¹³ CF Schedule 5 of the Basin Plan.

¹⁴ https://www.pc.gov.au/__data/assets/pdf_file/0008/227483/sub040-basin-plan.pdf

- projects that can be demonstrated to result in real water savings;
- that these savings are accurately quantified;
- that they are underpinned by accurate water accounting;
- that they help to deliver the Schedule 5 outcomes;
- the importance of providing the community with accurate information about all of the above; and
- the importance of early stakeholder engagement with respect to program design.

If defensible evidence supporting the capacity of a project to deliver quantifiable water savings cannot be provided, the project should not be approved. Furthermore, if the 450GL cannot be obtained by way of legitimate efficiency projects that result in increased water availability, the water should be recovered via the voluntary purchase of entitlements. This would require an amendment to the Water Act (see **Annex 1**).

Part 5: Constraints

EDOs of Australia share many of the concerns raised by the Commission with respect to constraints management. However, we wish to make some additional comments in relation to this matter.

First, and as you are well aware, modelling was undertaken in relation to the 3,200GL/year plus relaxed constraints scenario (which is in turn linked to Part 2AA of the Water Act and Schedule 5 of the Basin Plan). Only three of the 25 of the targets set for four hydrological indicator sites on the River Murray under the 3,200GL plus relaxed constraints scenario are met with a low level of uncertainty.¹⁵ This means that for the remaining 22 targets, there is a *high risk* that they will not be met.

Second, the failure to meet one third of targets under the 3,200GL/year plus relaxed constraints scenario has been compounded by fundamental issues with constraints management at a State level. Specifically, the business cases for relevant supply measure projects propose flows at key locations which are lower (in some instances significantly so) than the targets set for the MDBA in its Constraints Management Strategy. Affected sites include the Murray downstream of Yarrawonga; the Darling at Weir 32; the Murrumbidgee at Gundagai and Balranald; the Goulbourn at McCoy's Bridge and total flows at the South Australian border.¹⁶

Third, the Constraints Management Strategy sets a target of 111,000 ML/day at the South Australian Border, with this volume being required to meet the 80,000ML/day flow target set for the SA Border in Schedule 5 of the Basin Plan. This volume of water is required to inundate the areas of floodplain in South Australia between Ramsar sites. To that end and according to the MDBA, 'About half the Chowilla Floodplain is inundated at flows of 80,000 ML/d and flows in excess of 100,000 ML/day inundate extensive areas of the entire site (MDBC 2006).'¹⁷

As noted in Part 1, signatories to the Ramsar Convention are required to promote the 'wise use' of all wetlands within their territory (as well as the conservation of Ramsar-listed sites), thereby bringing non-listed wetlands within the scope of the Water Act. As

¹⁵ MDBA, *Hydrologic modelling of the relaxation of operational constraints in the southern connected system: Methods and results* (2012), p. xi.

¹⁶ Murray-Darling Basin Ministerial Council, 2016. *Package of supply, constraints and efficiency measures agreed by the Murray–Darling Basin Ministerial Council on 22 April 2016*. For further analysis see: Wentworth Group of Concerned Scientists, *Murray-Darling Basin Plan, Requirements for SDL Adjustment Projects*, May 6 2018, p. 5.

¹⁷ MDBA, *Assessment of environmental water requirements for the proposed Basin Plan: Riverland-Chowilla Floodplain* (2012), p. 7.

<https://www.mdba.gov.au/sites/default/files/archived/proposed/EWR-Riverland-Chowilla.pdf>

the constraints target set by the States for the South Australian border currently sits at 73,000ML/day,¹⁸ there is considerable concern that the non-listed wetlands located on South Australia's Chowilla floodplains will not receive adequate inundation to satisfy the 'wise use' test.

We are therefore of the view that there is a **high risk** that Schedule 5 targets will not be met, which could in turn undermine compliance with Australia's international obligations. As a first step, constraints proposals should be modified so that they are consistent with the Constraints Management Strategy and the outcomes sought in this Strategy should be prioritised to ensure that additional water recovered under Part 2AA of the Water Act can be physically delivered and achieve the required outcomes. Furthermore, as only three of the 25 of the targets set for four hydrological indicator sites on the River Murray under the 3,200GL plus relaxed constraints scenario are met with a low level of uncertainty, consideration should be given to first, the consequences of failing to meet these targets and second, the most appropriate means to address this issue.

Part 6: Planned environmental water

Planned environmental water, climate change and SDLs

In its 2011 review of the proposed ESLT, the CSIRO indicates that SDLs were based on historic climate data due to a 'policy decision by MDBA to accept the climate change risk sharing amongst users that is represented in current water sharing plans. Under most current water sharing plans planned environmental water is the least secure water share under a drying climate.'¹⁹

The vulnerability of planned environmental water (**PEW**) in a changing climate raises serious questions with respect to clause 10.28 of the Basin Plan and s. 21(5) of the Water Act, both of which require that there be no net reduction in the protection of PEW under the Basin Plan and its subsidiary instruments.

The noun 'protection' (or the verb to protect) is defined by the Oxford Living Dictionary to include preservation or conservation in the environmental sense. Within the present context, this would arguably mean preserving the volume of PEW provided for under water sharing plans immediately prior to the passage of the Basin Plan, as well as relevant rules designed to procure a specific ecological outcome with that water. We further note that one cannot protect and diminish a resource at the same time – these are diametrically opposed processes.

It is therefore arguable that in order to properly comply with s. 21(5) of the Water Act, SDLs must take into account climate change. Unless water availability across the Basin remains unchanged, failure to do will in time reduce the volume of PEW relative to the volume available prior to the introduction of the Basin Plan (that is, under historic climatic conditions). The same argument would apply in relation to cl. 10.28 of the Basin Plan. If SDLs do not take into account climate change, the only other conceivable means of preserving pre-Basin Plan levels of protection for PEW would be to ensure that allocations diminish over time consistently with reduced water availability. This could potentially extend to high security entitlements, depending on reductions in water availability in certain parts of the Basin in the coming years and decades.

¹⁸ Package of supply, constraints and efficiency measures

agreed by the Murray–Darling Basin Ministerial Council on 22 April 2016.

¹⁹ Young, WJ et al, *Science Review of the Estimation of an Environmentally Sustainable level of take for the Murray-Darling Basin: Final Report to the Murray-Darling Basin from the CSIRO Water for a Healthy Country Flagship, Report*, CSIRO, 2011, p. 22.

The risk-assignment provisions in the Water Act preclude entitlement holders from being compensated due to changes in allocations that are attributable to climate change, this being consistent with cl. 48 of the National Water Initiative. It would therefore seem preferable for the Government to make a decision to amend SDLs by 2024 to take into account climate change and to purchase the necessary volume of water from willing vendors. This would in turn allow entitlement holders to sell their water at market value and to reinvest the proceeds in the most efficient manner, rather than simply being forced to absorb the cost of reduced allocations at some future date.

Alternatively, the Government could maintain current SDLs, which will in all likelihood fail to protect PEW as required, thereby resulting in breaches of s. 21(5) of the Water Act and cl. 10.28 of the Basin Plan, which is clearly undesirable.

In summary, we are of the view that there is a **high risk** that there will be a net reduction in the protection of PEW (which is the bulk of environmental water), which is unlawful under s. 21(5) of the Water Act and cl. 10.28 of the Basin Plan. This requires reconsideration of existing SDLs (to take into account climate change) and adequate rules-based protection of this water in water resource plans. There is also a **high risk** that the government's failure to address climate change now will result in entitlement holders assuming financial responsibility for future reductions in allocations (with no recourse to compensation).

PEW and on-farm efficiency works

EDO of Australia notes the commonly invoked argument that the transfer of water access entitlements is sufficient proof that these projects result in water savings (and increased flows). In the first instance, a paper transaction does not in and of itself guarantee that there is any additional water in the river. Rather, it is proof of a share in a water resource, nothing more. If water savings are not actually being achieved to the extent reflected in licence shares transferred to the Commonwealth, then the pool of water assumed to be available for licenced use will be less than the actual, physical pool of water. By way of example, imagine that there are three licences in a valley that add up to 300ML. For the sake of simplicity, we will assume that they are only entitled to take a maximum of 100% of their share component in one year and that carryover does not apply.

The first two licences are each for 100ML and are used for irrigation. The third licence has a share component of 100ML and was transferred to the CEWH as part of an on-farm efficiency project. However, the project only resulted in an additional 50ML of water being physically returned to the river – even though the CEWH now holds a licence for 100ML. This means the three licence holders – who still collectively own 300ML on paper – are in fact drawing from a physical pool of 250ML of actual, held water. This then begs the question, where does the additional 50ML of physical water come from to service the share components of these three licences? It will in all likelihood be drawn from the pool of PEW, which is in my view the most vulnerable to erosion. This in turn raises questions as to whether the failure to ensure that on-farm efficiency projects are saving actual water will result in breaches of s. 21(5) of the Water Act and cl. 10.28 of the Basin Plan.

In summary, we are of the view that there is a **medium to high risk** that there will be a net reduction in the protection of PEW as a result of on-farm efficiency works which do not result in the volume of water recorded on an entitlement transferred to the CEWH being matched by actual water savings. This requires the introduction of adequate monitoring to quantify the volume of water that is actually being saved as a result of on-farm irrigation upgrades and ultimately a greater focus on the outright purchase of water entitlements (which will require amendments to the Water Act, as set out in **Annex 1**).²⁰

Part 7: Water resource planning

EDOs of Australia agrees with the Commission's concerns regarding the completion and accreditation of WRPs by the statutory deadline. We believe that the necessary amendments should be made to allow more time to ensure that this process is thorough, that all necessary information is provided to the public and that the resulting WRPs are legally compliant. We also wish to raise a number of matters which are relevant to the development of WRPs, and which could undermine their effectiveness in delivering Basin Plan targets – and potentially their legality.

Pre-requisite policy measures (PPM)

EDOs of Australia has undertaken a detailed analysis of Chapter 7 and Schedule 6 of the Basin Plan, the hydrological modelling underpinning the Basin Plan and a range of relevant policy documents.²¹ We have accordingly formed the view that water shepherding in the Barwon-Darling River is likely to be a PPM for the purposes of cl. 7.15 of the Plan. Assuming that we are correct, failure to implement this policy would mean that the 'unshepherded' volume would have to be deducted from the overall supply measure contribution for the Menindee Lakes Scheme. We have been informed by the MDBA that they do not agree with our analysis, which means that the supply measure contribution for the Menindee Lakes project was calculated without deducting the 'unimplemented policy measure' (i.e. shepherding) from the initial figure. Again, assuming we are correct, the current calculation would not be consistent with cl. 7.15 and Schedule 6 of the Plan, which could in turn render the contribution figure unlawful. We can provide the Commission with a more detailed explanation of our legal analysis if required.²²

Clause 6.14

EDOs of Australia is of the view that cl. 6.14 of the Basin Plan has been misinterpreted, which has in turn has promoted the idea that certain rule changes in WRPs would be 'unlawful'. Specifically, the MDBA's 'Water Resource Plan Requirements: Position Statement 1H - Potential Reliability Changes' asserts that:

'...the operation of s6.14 means that a WRP need not include new rules to give effect to particular requirements of Chapter 10 if it is not possible to include such rules without causing a change in reliability. Sections of the Basin Plan where this may become relevant include s10.17 (see also Position Statement 4A), ss10.18-10.21 (see also Position Statement 4B-4E) and s10.26 (see also Position Statement 6B).'

Put simply, this assessment assumes that cl. 6.14 automatically overrides:

- cl. 10.17, which states that a WRP must include rules to ensure it does not compromise environmental watering requirements of priority environmental assets and priority ecosystem functions;

²¹ MDBA, Hydrologic modelling to inform the proposed Basin Plan - methods and results, pp. 104, 113 (notably 5.7.5 which is entitled 'Modelling methodology' and 5.7.7 which is entitled 'Future work').

DPI Water, *Proposed arrangements for shepherding environmental water in NSW Draft for consultation*, March 2012; DPI Water, *Draft NSW Prerequisite Policy Measures Implementation Plan*, May 9 2015; Martin, W, Turner, G, *SDL Adjustment Stocktake Report*, August 2015, p. Page 71 (see includes a box entitled 'External risks managed').

²² Basin Plan, cl. 7.15(1)(b).

- cl. 10.26, which states that a WRP must provide for environmental watering to occur in a way that is: a) consistent with i) the environmental watering plan; ii) the Basin-wide environmental watering strategy and b) contributes to the achievement of the objectives in Part 2 of Chapter 8 of the Plan;
- cl. 8.02, which states that the purpose of the environmental watering plan is to achieve the objectives in Part 2, and to give effect to the principles in Division 6 of Part 4.

However, given the manner in which cll. 10.17-10.21 and 10.26 have been drafted, and the fact that they are fundamental to discharging Australia's international obligations under the Water Act, it is difficult to conclude that cl. 6.14 would simply override them in the prescribed circumstances (these being a change in reliability of allocations that triggers Subdivision B of Division 4 of Part 2 of the Water Act). In summary, we are of the view that the aforementioned extract from Position Statement 1H is based on a misconstruction of the relevant rules of statutory interpretation.

We further note that only rule changes that impact on reliability of allocations could potentially trigger Subdivision B of Division 4 of Part 2. Event-based management which involves temporary embargos on pumping (to allow held environmental water to pass through the system) would not fall in this category as such rule changes impact on access to water, not allocations.

In summary, there is a **moderate to high risk** that the misinterpretation of cl. 6.14 will dissuade Basin States from including rules in WRPs to give effect to certain elements of Chapter 10 (and by way of association, Chapter 8). This would in turn undermine core components of the Basin Plan and by way of extension, the legality of any affected WRPs.

Part 8: Compliance

State level

EDOs of Australia would like to acknowledge that significant progress has been made in NSW since the Four Corners' episode Pumped aired on 24 July 2017, notably in relation to the establishment of the Natural Resources Access Regulator (**NRAR**). However, the continued success of the NRAR will depend on ongoing funding, which has proven to be problematic in the past. There is also significant room for improvement with respect to transparency. At present, licence usage and account data is not publicly available and is extremely difficult for the public to obtain. The NSW Government has committed to drafting new regulations in relation to this issue, however it remains unclear what these regulations will contain, particularly given the opposition amongst certain parties to the publication of such data.

By way of contrast, we have considerable concerns with respect to compliance and enforcement in QLD. Some of these concerns are echoed in the MDBA's 2017 Compliance Review and relate to the percentage of unmetered take in QLD (68 percent); poor enforcement of existing laws; inadequate staff and funding for audits and compliance activities; and poor reporting of monitoring and compliance.²³

To this we would add very low levels of transparency with respect to allocations, licences and works approvals. For example, the publicly available data sets for allocations comprise excel spread sheets with administrative references which do not correspond to searchable title references (for entitlements that are unbundled from the land). To obtain information regarding overland flow licences (which are still bundled to the land), it is necessary to formally apply to the relevant local council, which is time consuming and to

²³ MDBA, *The Murray–Darling Basin Water Compliance Review*, 2017, pp. 41, 85, 86, 89-94.

that extent impractical. In reality, this information should be publicly available on an easy to search register as is the case in NSW (noting, however, significant limitations in respect of the existing NSW Water Register).

The commitments made by Queensland in Schedule 4 of the Compliance Compact entered into by Basin States and the Commonwealth unfortunately do little to assuage our concerns. For example, s. 1, which concerns transparency, does not provide for a publicly available register containing all allocation, licensing and works approvals. In the absence of this information the community can have little faith in the Government's commitment to true transparency. Section 2, which concerns compliance and enforcement, does not include any tangible performance indicators, only general statements about reviewing and improving upon existing systems.

In summary, we are of the view that there is a **high risk** that compliance and enforcement will remain problematic in QLD unless more specific commitments, supported by concrete action and appropriate resourcing, are forthcoming. The issues identified above reinforce the need for the Commonwealth to develop its compliance capacity.

Commonwealth level

EDOs of Australia would like to see a properly resourced compliance unit at the national level which is capable of enforcing the Water Act and Basin Plan if State agencies do not take suitable action in a timely manner. We also recommend augmenting the compliance provisions in the Water Act to include offence provisions and third party standing.

Offence provisions are – to the best of our knowledge – included in all other natural resource management statutes in Australia. This notably includes the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Third party standing is provided for in most environment, planning and water legislation in NSW (including the *Water Management Act 2000*,²⁴ the *Protection of the Environment Operations Act 1997*²⁵ and the *Environmental Planning and Assessment Act 1979*²⁶) and is based on the idea that the community should have the opportunity to remedy an alleged breach of a statute which was enacted to protect shared natural resources. This is particularly important for two reasons: first, it is not uncommon for governments to fail to enforce their own laws²⁷ and second, it is virtually impossible to obtain an order for mandamus compelling the government to enforce a particular environmental law (indeed, no such precedent exists).

Part 9: International legal obligations

It is an uncontroversial fact that the Water Act derives the majority of its constitutional validity from a suite of bilateral and multilateral environmental treaties to which Australia is signatory, known as the 'relevant international agreements.'²⁸ Most of these agreements are narrow in focus and to that extent cannot legitimise the sweeping mandate of the Water Act and Basin Plan. The notable exceptions are the Ramsar Convention and Biodiversity Convention. The relevance of the former is well-established: 16 of Australia's 66 Ramsar-listed wetlands are located in the Murray-Darling Basin. The latter is the principal international legal instrument seeking to protect and restore

²⁴ Section 336.

²⁵ Section 252.

²⁶ Section 9.45.

²⁷ We can provide the Productivity Commission with numerous examples to illustrate this point.

²⁸ Water Act, s. 9.

biological diversity. As such, it includes numerous obligations applicable to the use and management of Basin water resources. The Water Act tends to reinforce this analysis by paying particular attention to the implementation of the Biodiversity Convention and Ramsar Convention under the Plan.

It is our view that the current version of the Basin Plan may not properly implement (as per the test established by the High Court)²⁹ some of Australia's international legal obligations (in particular the Ramsar Convention).³⁰ This may in turn call into question the constitutional validity of the Basin Plan, which arguably poses a **high risk** to its ongoing effectiveness. Further information regarding this issue can be found in the article entitled 'The silence of the plan: will the Convention on Biological Diversity and Ramsar Convention be implemented in the Murray-Darling Basin'.³¹

Part 10: Floodplain harvesting

The NSW Government is in the process of implementing its Floodplain Harvesting Policy. EDO NSW supports the licensing of floodplain harvesting to the extent that it is consistent with the requirement that SDLs reflect an ESLT.

We note that current SDLs were developed on the basis that floodplain harvesting accounted for approximately 210GL of water across the entire Northern Basin,³² (which includes Queensland). In other words, the baseline diversion limit (**BDL**) assumed that this volume of water was being diverted from overland flows. The volumes that to be licensed across Northern NSW are likely to well exceed this figure, which raises questions about compliance with SDLs in the relevant valleys.

The MDBA has indicated that this issue will be addressed by raising BDLs and subsequently then SDLs by a corresponding volume (that is, water recovery will remain unchanged).

However, it is our legal opinion that any increase in BDLs should result in an increase in water recovery and reduced SDLs – not maintenance of the same recovery volume and increased SDLs. Indeed, the method proposed by the MDBA is likely to be unlawful insofar as it is unlikely to result in SDLs that reflect an ESLT, as required by s. 23(1) of the Water Act. Specifically, if more water was being extracted in 2009 (which is the baseline year), this logically requires greater water recovery to compensate for historically higher, less sustainable diversions. Again, this poses a **high risk** to the legality of the Basin Plan and by way of extension, its effectiveness.

Part 11: Governance

EDOs of Australia requires more time to contemplate the implications of the proposed changes to governance arrangements, and to consult with other experts on the subject. We would therefore welcome the opportunity to provide the Commission with supplementary comments at a later date.

END

²⁹ *State of Victoria v Commonwealth* (1996) 187 CLR 416.

³⁰ Refer to Part 1 and Part 5 of this submission for examples.

³¹ Carmody, Emma, The silence of the plan: will the Convention on Biological Diversity and Ramsar Convention be implemented in the Murray-Darling Basin, (2013) 30 *EPLJ* 56.

³² MDBA, *The Murray–Darling Basin Water Compliance Review*, 2017, P. 42.