



EDOs of Australia

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Productivity Commission
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Sent by email: water.reform@pc.gov.au

Dear Commissioners,

Inquiry into National Water Reform

EDOs of Australia (**EDOA**) welcome the opportunity to make a submission to the Productivity Commission's inquiry into National Water Reform.

EDO offices have 30 years' experience advising Australian communities on using the law to protect the environment, including advice, casework, education and law reform. These services are fundamental to providing access to justice across the spectrum of federal and state environmental and natural resource management (**NRM**) laws.

EDOA has extensive experience advising on all aspects of water law and policy in all Australian jurisdictions, including in relation to:

- licensing requirements;
- works and use approvals;
- metering;
- environmental water;
- water markets;
- implementation of the Basin Plan;
- Australia's obligations under the Ramsar Convention; and
- the impact of large mining and unconventional gas developments on water resources.

Our law reform and policy work includes submissions responding to the Draft Basin Plan, strategies made pursuant to the Basin Plan, and various amendments to the *Water Act 2007*.

This submission will briefly address the following five issues, all of which should be considered National Water Reform Priorities:

- 1. Access to information**
- 2. Compliance, enforcement and markets**
- 3. Climate change**
- 4. Protection of environmental water**
- 5. Extractive industries including mining.**

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1. Access to information

EDOA is concerned that access to information – including licensing details, the names of licence holders, account information and applications and approvals for dealings – is lacking or non-existent in certain jurisdictions.¹ This constitutes a significant barrier to meaningfully enforcing the law (including licence conditions and trading rules), which in turn reduces community confidence in water regulation and governance. By way of example, the *Water Management Act 2000* (NSW) has third party standing provisions, theoretically enabling any person to enforce a breach of the Act. However, the following information is not available on the NSW Water Register, thereby making it extremely difficult for the community to verify whether a breach has occurred and to bring civil enforcement proceedings:

- the names of licence holders (this information can only be obtained via a title search if the licence number is known);
- account information for individual licences (allocations and balance);
- information for cancelled licences (including the relevant dealing history);
- applications for dealings requiring ministerial approval;²
- licences issued under the *Water Act 1912* (NSW).³

The counterargument to greater transparency is that it is inconsistent with privacy laws. It is our view that this argument is lacking in merit for the following reasons:

- Many licences are held by corporations, to which privacy obligations do not apply.
- It is widely acknowledged that our shared water resources must be managed sustainably and consistently with the law. This is particularly true in light of climate change and its likely impacts on water availability in certain parts of the country. The public interest in doing so far outweighs any concerns regarding confidentiality.
- To the best of our knowledge, no one has clearly articulated why greater transparency would negatively impact law-abiding licence holders or their commercial interests.
- The law in many jurisdictions acknowledges that it is in the public interest for the community to have access to development applications, development consents and pollution licences, all of which are connected to the commercial interests of the relevant applicant or licence holder. It is logically inconsistent to fail to extend the same level of access to water licensing, particularly given the importance of managing water resources in a sustainable manner.
- Similarly, under Australian laws it is relatively easy to undertake searches to obtain information about property and companies. This includes land titles, encumbrances on land titles (including mortgages), survey plans, land value, company extracts, roles and relationships extracts and so on. Much of this information is arguably more sensitive than a water account balance for a particular licence, for example.

EDOA therefore recommends that steps are taken to improve transparency and free public access to information. As previously indicated, this would increase community confidence in water management systems and augment compliance and enforcement (see point 2, below).

¹ See for example: McKay, Clare and Gardner, Alex, *Water Accounting Information and Confidentiality in Australia*, Federal Law Review, Volume 41, 2013, pp 127-162.

² As there is a three month limit on commencing judicial review proceedings, it is important that this information be made publicly available so that the community is first, aware that an application has been made and second, able to receive legal advice as to whether the dealing is lawful.

³ In order to ascertain whether conversion to water access licenses under the *Water Management Act 2000* and relevant regulations has been undertaken in accordance with the law.

2. Compliance, enforcement and markets

EDOA is concerned that effective compliance and enforcement remains a significant issue in many catchments. Specific issues reported to EDOs include:

- absent or ineffective metering;
- tampering with meters;
- failure to keep logbooks where required by law;
- failure on the part of responsible agencies to properly investigate serious allegations of non-compliance;
- insufficient number of compliance officers;
- insufficient monitoring (for example in relation to incidental take associated with mining operations); and
- unlawful trading activity.

Lack of compliance and enforcement undermines community confidence in water regulation and has a negative impact on the environment and other users. Furthermore, the success of water markets depends on the assumptions underpinning markets being correct. Failure to uphold any of these assumptions – for example, accurate measurement of water availability and use, compliance with licensing conditions and adherence to trading rules – distorts the market. This is a significant issue that requires detailed analysis and decisive action by the relevant agencies. This is particularly true given the value of water markets (especially in the MDB) and their role in maintaining sustainable levels of extraction and equity amongst users.

3. Climate change

EDOA is concerned that water allocations do not take into account likely, future climate change. This poses a significant risk to both the environment and users as water becomes scarcer in certain catchments across the country. As noted in a recent article concerning water allocations in Australia's most heavily regulated river basin, the Murray-Darling Basin (MDB):⁴

While it is true that water allocations may continue to vary from year to year in response to prevailing weather conditions, data from the Millennium Drought indicates that “environmental flows across the basin declined by about four times as much as reductions in surface water extractions by irrigators.”⁵

As such, there is “little evidence that the existing allocations framework is a cure-all for future reductions in rainfall”⁶ in the MDB. Furthermore:

Reallocation of water to account for climate change will get harder, not easier, as funds from the Australian Government's multi-billion dollar Water for the Future package are exhausted and if water availability declines. Further, adjustment of the SDLs is now legally complex and administratively difficult.⁷

⁴ Carmody, Emma “Climate change is water change: integrating water management, mitigation and adaptation laws and policies” *Australian Environment Review*, (2017) 31(10), p. 360.

⁵ 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) 35 <https://publications.csiro.au/rpr/download?pid=procite:cfc7ab48-acf5-4cff-87aa-f398cfb0287f&dsid=DS1>.

⁶ Above, n 4.

⁷ J Pittock, R Grafton and J Williams “The Murray-Darling Basin Plan fails to adequately deal with climate change” (2015) 42(6) *Water*, p. 30.

In summary, it is imperative that the issue of climate change be addressed in order to maintain water security for the environment, industry and regional communities.

4. Protection of environmental water

EDOA acknowledges that significant progress has been made – particularly in the MDB – to recover water for the environment. However, the benefits of this recovery have been undermined by insufficient protection of environmental flows. For example, it has been brought to our attention that water held by Commonwealth Environmental Water Holder (**CEWH**) and released for the environment has – in certain instances - been extracted for commercial use.⁸

While it is often argued that ‘cap protects the environment’, such an approach fails to take into account the fact that species and ecosystems do not function on the basis of long-term annual averages. Accordingly, event-by-event management is at times required to generate actual environmental outcomes (for example bird and fish breeding events) and to protect water quality. This means that rules must be in place to prevent environmental water from being pumped as it flows through the system. This is particularly important as the CEWH’s water has been purchased with public monies to fulfil the obligations outlined in the *Water Act 2007* (which includes Australia’s obligations under a number of environmental treaties, including the Ramsar Convention and the Convention on Biological Diversity).

5. Extractive industries including mining

EDOA is extremely concerned that extractive industries remain outside the broader planning and water entitlement framework in many jurisdictions. Furthermore, even where these industries are included in planning regimes, certain activities (such as incidental groundwater take in mining activities) are subject to exemptions that do not require activities to account for their full water use. These problems are exacerbated in jurisdictions where very little is known about water resources and licencing requirements do not cover significant extractive industries. Failure to fully account for water management is a significant threat to the sustainability of water use and the environment and industries that rely on it.

Please do not hesitate to contact us if you have any further questions regarding this submission.

Kind Regards,

Dr Emma Carmody
Policy and Law Reform Solicitor
EDO NSW on behalf of EDOA

⁸ For example in the Northern MDB.