



EDOs of Australia

Senate Standing Committee on Environment and Communications – inquiry into the Water Amendment (Purchase Limit Repeal) Bill 2019 25 February 2019

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 *Water Amendment (Purchase Limit Repeal) Bill 2019 (the Bill)*.

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 2012* 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.

Overall, we support a scientifically rigorous, risk-based approach to laws and policies governing water management in the Murray-Darling Basin. Such an approach is vital if we are to manage our most productive river system sustainably, provide water security in a changing climate and promote regional development.

While EDOA supports this Bill as a first step, that step must be viewed in the context of the overall implementation of the *Water Act 2007* and *Basin Plan 2012* and the recent independent Royal reviews conducted by the Productivity Commission and the South Australian Royal Commission.

In that regard, EDOA believes that the Bill should:

1. include amendments to Part 2AA to allow buybacks to replace efficiency measures to ensure that the objects of that part are achieved;
2. be supported by a buybacks strategy to ensure that buybacks represent measurable environmental benefit and value for money, including in a changing climate;
3. be accompanied by measures to ensure that environmental flows are protected and to prevent environmental watering events from being converted into irrigation opportunities;
4. be complemented by a review of supply measures in light of recent findings which cast doubt on the timing, anticipated benefits and indeed lawfulness of these measures.

These amendments must be followed by a comprehensive review of the findings of the South Australian Royal Commission to, at minimum, arrive at an effective Sustainable Diversion Limit (**SDL**) through a lawfully determined Environmentally Sustainable Level of Take (**ESLT**).

Part 1: Scope of purchase limit

EDOA supports the purchase of water entitlements from willing sellers¹ as an effective and efficient way to return more water to the environment to achieve the Objects identified in s3 of the *Water Act 2007*.

In that regard, we support the Bill. However, the proposed amendments should also include amendments to Part 2AA of the *Water Act 2007* to allow the 450GL of 'upwater' identified in s86AA to also proceed by way of buybacks.

The SDL Adjustment Mechanism in the *Basin Plan 2012* allows adjustments to the SDL to either allow increased take of water through projects ('supply measures') which create equivalent outcomes with less water (eg. the Menindee Lakes project which aims to reduce evaporative loss) or to decrease take and make additional water available for the environment ('upwater') through efficiency measures (which can include, for example, lining water delivery channels or upgrading irrigation systems).

Part 2AA of the *Water Act 2007* established, and appropriated funds for, the Water for Environment Special Account with the objective of, among other things, facilitating this 450GL of 'upwater'.

The current 1,500GL cap on buybacks (contained in s85C) does not apply to the acquisition of water entitlements made in association with efficiency measures using funds from the Water for Environment Special Account². As a consequence, the Bill will not create the capacity for funds from that account to be used for buybacks not associated with efficiency projects³.

Progress towards recovering the 450GL of 'upwater' contemplated by Part 2AA of the *Water Act 2007* has been very slow, with less than 2GL of water recovered or contracted⁴. The Productivity Commission's recent review⁵ identified a range of risks associated with the use of efficiency measures including uncertainty in environmental outcomes achievable and a risk that the program could become significantly more expensive than anticipated.

Efficiency measures are already an expensive way of recovering water⁶, with earlier work by the Productivity Commission⁷ finding that buybacks from willing sellers were the most effective and efficient means of recovering water.

¹ The *Water Act 2007* does not allow the Commonwealth to undertake compulsory acquisition of water access rights (see s255 *Water Act 2007*).

² See s85(c)(4).

³ See s86AD(4).

⁴ <http://www.agriculture.gov.au/SiteCollectionDocuments/water/progress-recovery/surface-water-recovery.pdf>

⁵ Productivity Commission, 2018, Murray-Darling Basin Plan: Five-year assessment, Final Report no. 90, Canberra.

⁶ For example, the Productivity Commission reported that the program offered a premium of 75% on the market price for entitlements recovered through efficiency projects.

⁷ Productivity Commission, Market Mechanisms for Recovering Water in the Murray-Darling Basin (Research Report, March 2010) (RCE 496) 122.

The South Australian Royal Commission found no compelling reason to justify the additional expense of efficiency measures and went on to recommend that further recovery of water, including under Part 2AA of the *Water Act 2007*, proceed by way of buybacks.

To ensure that the taxpayer receives value for money for their investment in the Murray-Darling Basin, we recommend that the Bill be expanded to provide flexibility for some or all of the 450GL of 'upwater' under Part 2AA to proceed by way of buybacks.

Part 2: Strategic buybacks

Given the large sums of public money involved and the critical importance of bringing the Murray-Darling back to health, it is important that the available funds be deployed strategically to ensure that they create the best value for money and for our environment in the long term.

In that regard, it is concerning that a significant proportion of the Commonwealth's portfolio of water entitlements is low reliability water (which effectively means water that may not be delivered during drier periods). This type of entitlement is not only of less value in drought conditions but likely to be of less value as its availability will diminish over time due to the impacts of climate change.

We strongly recommend that future buybacks proceed under a strategic approach which ensures that they represent value for money and measurable environmental benefits, including in a changing climate.

Part 3: Protection of environmental flows

The amendments proposed in the Bill must be accompanied by action to protect environmental water as it moves through the system, to prevent environmental flows from being converted into irrigation opportunities.

This means that both Water Plans prepared under the Basin Plan and *Water Act 2000 (Qld)* and Water Sharing Plans prepared under the Basin Plan and *Water Management Act 2000 (NSW)* must contain rules to ensure that releases of environmental water can have their intended effect.

At present water sharing plans in NSW made under the *Water Management Act 2000* generally do not include rules to protect environmental water as it flows through the system – environmental watering events may even trigger 'commence-to-pump' rules which allow legal extraction of water purchased to protect the environment. We also have serious concerns (as discussed in the SA Royal Commission report from page 295) that Water Resource Plans made under the *Water Act 2007* will be similarly lacking in proper protections for environmental water.

While water shepherding is a toolkit measure for the Northern Basin and in our view also a preliminary policy measure under the Basin Plan, we have serious concerns that the approach being taken by both the MDBA and the NSW government will not deliver adequate protections for environmental water. This Bill should be accompanied by amendments to the *Basin Plan 2012* which will ensure that cease-to-pump rules apply to environmental watering events. In the absence of amendments of this type, there is a risk that environmental water will represent a windfall for some irrigators and a poor investment for taxpayers and the environment.

Part 4: Supply Measures

The Bill does not address supply measures⁸. However, their introduction as part of the SDL Adjustment Mechanism⁹ did form part of the rationale when the purchase limit was enacted under *Water Amendment Act 2015* and this Bill represents an opportunity to take up any slack left by failed supply measures.

Under Chapter 7 and Schedule 6A of the *Basin Plan 2012*, supply measures have been approved under the SDL Adjustment Mechanism to increase the SDL by 605GL. Given that these measures have increased the allowable level of water take so significantly, it is extremely concerning that doubts have been identified in the recent independent reviews about the timeframes for delivery, potential benefits¹⁰ and even the lawfulness of reliance on unimplemented supply measures¹¹.

At minimum, recommendation 4.4 of the Productivity Commission review should be implemented to review supply projects and discard any which have insufficient benefits or are not deliverable in a timely way. If this Bill is passed, any gap left by discarded projects can be taken up by strategic buybacks from willing sellers. A more defensible approach would be a thorough review of the use of supply measures as part of a broader review of the SDL.

⁸ See section 1 above. Supply Measures are part of the SDL adjustment mechanism intended to allow additional water take on the basis of projects which create equivalent outcomes with less water.

⁹ See Part 1 above.

¹⁰ See Productivity Commission 5 year review, at page 19.

¹¹ See recommendation 5(a) South Australia, Murray-Darling Basin Royal Commission, *Report* (2019).