



Law Council
OF AUSTRALIA

Legal Practice Section

28 September 2023

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ec.sen@aph.gov.au

Dear Committee,

Water Amendment (Restoring Our Rivers) Bill 2023

This submission has been prepared by the Australian Environment and Planning Group of the Law Council of Australia's Legal Practice Section. The Committee welcomes the opportunity to make a submission to the Senate Standing Committees on Environment and Communications in relation to the Water Amendment (Restoring Our Rivers) Bill 2023 .

1. The Legal Practice Section strongly supports action to address issues associated with the protection, management, and operation of the Murray Darling Basin (**MDB**) and the protection of its environmental Indigenous cultural heritage values.
2. The Bill amends the *Water Act 2007* (the **Act**), which is:

... an Act to make provision for the management of the water resources of the Murray-Darling Basin, and to make provision for other matters of national interest in relation to water and water information, and for related purposes
3. The Act's objects include protecting the MDB's ecological values and ecosystem services, ensuring the return to environmentally sustainable levels of water extraction and, subject to these two objects, maximising the net economic returns from the use of the MDB's resources. Rebalancing consumptive waters uses and environment needs is a key objective of the Act.
4. The MDB's significance cannot be overstated. The MDB includes six of Australia's seven longest rivers, including the Murray (Australia's longest river) and the Darling (Australia's third longest river) and covers approximately one-seventh of the Australian landmass.
5. The MDB supports one of Australia's most significant agricultural areas with a strong irrigation sector and associated established commercial and residential centres.
6. It holds deep Indigenous cultural heritage and spiritual significance—not only to the Peoples across whose Country pass the rivers, their groundwater systems and the basin, but also to a far wider group of Indigenous Peoples whose cultural heritage links in with those rivers.

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7. The Basin Plan adopted under the Act significantly changed MDB water resource management and increased focus on water for the environment, establishing a greater Commonwealth role in MDB water management.
8. The MDB crosses State boundaries, which creates additional layers of complexity. The MDB has a complex water management, social and environmental history.

Background

9. Since the commencement of the Act, the impact of drought and climate change has resulted in greater reductions in environmental water, as against reductions in water entitlements for consumptive use. This period has also seen catastrophic fish losses, drying of river stretches and serious water quality issues, along with considerable stakeholder and community conflict. Over the same period, there has been increased national and international recognition and protection of Indigenous cultural heritage and development of human rights to environment, including water and rivers.
10. Groundwater reduction and fluxes in groundwater-river exchanges, together with potential water banking (intentionally recharging water to aquifers for subsequent withdrawal) have also emerged for consideration over the period.
11. There has also been an increased use across Australia of market solutions to environmental issues: e.g., water markets, nature repair markets.
12. Co-ordination of MDB reviews, legislative and policy regimes, and between MDB-related agencies is now highlighted as increasingly important. It requires administrative priority and appropriate funding to avoid 'silo-ing'. Some of the Federal and State policies that require co-ordination, in addition to water security and management, include drought, agricultural regional development, catchment management, bushfire and emergency planning, Closing the Gap and environmental protection.
13. In addition to the above, this Bill sits within a complex set of existing key timelines. Focal themes for the Basin Plan review were also released in July 2023, and include regulatory design.
14. This Bill comes forward alongside anticipated changes to the architecture of Commonwealth involvement in water and the environment within the context of the review underway of Australia's key environmental legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).
15. Protection of water-dependent species and Ramsar wetlands are challenges to which both the Act and EPBC Act are directed, requiring proper response to climate change as well as effective ongoing monitoring, evaluation and management.
16. Plans for a renewed National Water Initiative also present an opportunity to reconsider broader water issues to achieve better integration of water and environmental issues within and beyond the framework of the Basin Plan.
17. An holistic approach to water and environmental legislation is important to ensure adequate and co-ordinated protection of the MDB and the matters of national environmental significance (MNES) that are of concern within it. The Legal Practice Section has previously recommended that government avoids a piecemeal approach

to legislative change to the Act.¹ The fact that this Bill presents alongside the current EPBC Act review and the upcoming revision of the Basin Plan and, ultimately, the Act, does not mean all of these reviews, legislation and regulation will proceed in the co-ordinated way that is required. The coincidence of these reviews is an opportunity to 'join up' these disconnected domains.

Key features of the bill

18. The key features of the Bill are to:

- (a) extend a number of existing timeframes in the Act, including:
 - (i) the review date for the Act to the end of 2027; and
 - (ii) the date for delivering the Sustainable Diversion Limit Adjustment Mechanism (**SDLAM**) projects to 31 December 2026;
- (b) allow and encourage funds allocation from the Water for the Environment Special Account to include water access rights purchases for the purpose of increasing environmental water volumes by 450GL; and to enable payments to address any detrimental social or economic impact in MDB communities associated with purchases or efficiency projects. The link with sustainable diversion limits is removed. A review of this Account is timed to occur by 30 June 2024, and provided to the Minister no later than 30 September 2025;
- (c) remove the purchase cap;
- (d) introduce a mandatory Water Markets Intermediaries Code, along with a statutory trust accounting framework and civil penalties, with the ACCC given powers to monitor water prices and investigate misconduct;
- (e) include additional provisions addressing water markets decisions, insider trading and market manipulation extending to pre-trade, trade, and transfer of any eligible tradeable water right. Linkages between water market decisions and data provided to the Bureau of Meteorology (**BOM**) are dealt with. Commonwealth, the Basin States and irrigation infrastructure operators must make water market decisions available publicly, along with requirements to record, collect and report water market information;
- (f) address certain functions of the BoM relating to water markets information and its publication;
- (g) address the powers of the Inspector-General of Water Compliance to monitor States' water extraction with powers to monitor and enforce the data-reporting obligations; and
- (j) require the Basin Plan to contain an Action Plan and include certain amended prescribed information. There is a reporting requirement for a Basin State.

¹ Eg, Law Council of Australia's Legal Practice Section, [Submission to the Environment and Communications Legislation Committee on the Water Amendment \(Purchase Limit Repeal\) Bill 2019](#), 5 March 2019.

Submissions

19. The Legal Practice Section recognises that extensions to the timeframes in the Act now appear inevitable, and supports orderly timing arrangements. However, the consequences of failure to meet the extended timeframes should be matched with appropriate penalties if the new timeframes are not achieved. Mechanisms to avoid recurrence of yet further non-compliances with timeframes should be strong. The Law Council also considers that better timeline alignments could be achieved that would reinforce and strengthen outcomes.
20. The Bill encourages use of funds within the Environment Special Account to achieve the Act's targets more quickly. The amendments facilitate transitional assistance for community impacts. The Legal Practice Section supports initiatives to use this Account more effectively. It supports the removal of the cap—and the additional requirements for inclusion in the Basin Plan. The Legal Practice Section recommends a focus in the Bill on what is required by the States to ensure they meet the new extended sustainable diversion limit (**SDL**) projects deadline—and provisions of an enforceable fall-back position providing for and strengthening the negative consequences of failure, including for example reduced entitlement. In respect of buybacks, the Legal Practice Section recommends that the Bill includes provisions that address a scenario where there is no willing seller.
21. The Legal Practice Section strongly supports the strengthening of the integrity and transparency provisions of the Act in respect of market operations.
22. The Legal Practice Section recommends that the Bill be strengthened by additional provisions in respect of the following:
 - (a) more adaptive and flexible approaches toward environmental water planning and implementation, to take account of climate change as well as variability and uncertainties;
 - (b) considering the impact of climate change on environmental water compared to consumptive water;
 - (c) water quality, including salinity, algal blooms and fish kills to achieve better links between catchment management and river management as well as addressing data limitations, agency silos and insufficient attention to water quality. There are now 'non-negotiables' in respect of future water management negotiations and a need for processes that achieve more effective engagement. Consideration should also be given to creating a general environmental duty to prioritise the health of the MDB, comparable to such a duty contained in Victorian and Queensland Environment Protection legislation²;
 - (d) groundwater and the protection of groundwater ecosystems and considering cumulative risks to groundwater in an integrated way;
 - (e) greater inclusion of Indigenous people in decision-making under the Act, in addition to consultation processes. The views of Indigenous persons should be sought on how such decision-making processes might best work;

² *Environment Protection Act 2017 (Vic)*, s 25; *Environment Protection Act 1994 (Qld)*, s 319

- (f) alternative options for determining SDLs; and
- (g) stronger enforcement provisions and mechanisms.

23. Broader reform in this area would also benefit from the following considerations:

- (a) approaches to institutional reforms that could both better mediate divergent interests and see disagreement channelled into effective action to strengthen the capacity for adaptive management and ongoing values-setting. Formal structures for mediation and negotiation between divergent interests should be included.
- (b) governance structures need to identify those parties who should be involved in making value-based decisions under uncertainty and conflict resolution. Policy makers need to explicitly communicate uncertainty and foster public awareness of the impacts of uncertainty upon policy. Institutional arrangements need to strengthen the capacity for adaptive management and ongoing dialogue to contribute to managing trade-offs in conditions of dynamic change along with the presence of values conflict and pervasive uncertainty. Environmental governance needs to plan for the inevitability that the environment will change in the future and, in addition to properly planning for that change, needs also to adopt a contingency model of change that ensures responsive change strategies as the environmental change occurs;
- (c) initiatives and mechanisms to achieve better co-ordination between Commonwealth and state policies and the Plan; and
- (d) release of information by BoM needs to maintain sensitivity to Indigenous cultural heritage. The information released also needs to overcome a situation where a licence applicant is informed that water is fully allocated, but it is impossible to confirm this. Transparency is important in building trust in the system.

24. The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact Ms Robyn Glindemann or Dr Leonie Kelleher OAM, the Committee Co- Chairs, on robyn.glindemann@lantegy.com.au or leonie@kellehers.com.au.

Yours sincerely



Geoff Provis
Section Chair