Law Council
OF AUSTRALIA

Legal Practice Section

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Water Act Review
Department of Climate Change, Energy, the Environment and Water
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By email: wateractreview@dcceew.gov.au

Dear Sir/Madam

Water Act Review

1. This submission has been prepared by the Australian Environment and Planning Law Group (**AEPLG**) of the Law Council of Australia's Legal Practice Section.

2. AEPLG welcomes the opportunity to make a submission to the independent review of the *Water Act 2007* (Cth).

3. The Water Act was introduced to set environmentally sustainable diversion limits and reduce the over-allocation of water entitlements that challenge water security in the Murray-Darling Basin (the **Basin**).[1]

4. The review must examine the operation of the Water Act and the extent to which its objects have been achieved, and identify opportunities under the Water Act to promote the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples.[2] It must also consider, amongst other matters, whether the Water Act has the appropriate levers to effectively address the challenges of climate change in the management of Australia's water resources.[3]

5. For the purposes of this submission, the AEPLG will focus on the objects in section 3 of the Water Act and, in that context, the current and future challenges to water security because of a drying climate.

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1 Water Act, s 3(e) and s 23(1); *Water Act Review Discussion Paper*, https://www.dcceew.gov.au/sites/default/files/documents/water-act-review-discussion-paper-july-2026.pdf, p. 38;
2 Water Act, ss 253(1) and (1A).
3 Second Statutory Review of the *Water Act 2007*, Terms of Reference, https://www.dcceew.gov.au/sites/default/files/documents/second-review-water-act-terms-reference.pdf, para 6.

6. The AEPLG observes that the objects of the Water Act have been amended to recognise the knowledge, traditions and customs of Indigenous people in the management and use of Basin water resources.[4]

Objects clause as an expression of legislative intent

7. An 'objects clause', or statement of objective, at the beginning of a statute encapsulate not only the purposes of the legislative instrument but also the policies on which it is based. An objects clause is intended to assist a decision-maker in the interpretation of the provisions of the Act by setting out the purpose or object of the Act as envisaged by s 15AA of the *Acts Interpretation Act 1901* (Cth) (**Interpretation Act**). Section 15AA of the Interpretation Act provides: 'In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose of object is expressly stated in the Act) is to be preferred to each other interpretation'.

8. Whilst the matters set out in an objects clause are not usually expressed as mandatory considerations, they are intended to guide the exercise of discretion by delimiting or otherwise illuminating the scope and effect of the legislation.[5]

9. The AEPLG suggests that the objects clause in section 3 of the Water Act could be amended to include a reference to Australia's drying climate. Whilst s 3(e) of the Water Act currently refers to improving water security for all uses of Basin water resources, it does not account for the effects of climate change on those resources and environmental flows, including from higher temperatures, lower rainfall and droughts. An amendment to the Water Act, in these terms, would be consistent with the National Water Initiative, and the draft National Water Agreement, which identify climate change as an evolving challenge in environmentally sustainable water planning and in the preparation of water allocation plans by States and Territories.[6]

Environmental water requirements in a drying climate

10. The ecological (or environmental) water requirements (**EWR**s) of the Murray-Darling is a key consideration in water resource management decisions under the Basin Plan.[7] The EWR of a river, also known as 'environmental flow', is the minimum flow needed to maintain its associated values of water-dependent ecosystems at a low level of risk.[8]

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4 See Water Act, s 3(fa).

5 Renton Committee on Preparation of Legislation 63, First Report, (Cmnd 6053, 1975). The factors that must be considered by a decision-maker in the exercise of powers conferred by an Act, if not expressly provided, are implied form the Act's purpose, scope and subject matter: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) CLR 21.

6 *Intergovernmental Agreement on the National Water Initiative*, Between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory, 2004, cl 39; *Updated Draft National Water Agreement*, objective 6, p.16.

7 D Skinner and J Langford, 'Legislating for sustainable basin management: the story of Australia's Water Act (2007)', *Water Policy* 15 (2013) 871.

8 See *Water Act Review Discussion Paper*, https://www.dcceew.gov.au/sites/default/files/documents/water-act-review-discussion-paper-july-2026.pdf, p. 32; See also Water and Rivers Commission, *Environmental Water Provisions Policy for Western Australia*, Statewide Policy No. 5, p. 2.

11. Water-dependent ecosystems are those that rely on the presence of water, including any aquatic or semi-aquatic flora and fauna. Section 3(d)(ii) of the Water Act refers to 'water-dependent ecosystems,' in the context of the Basin, by providing that it is an object if the Act to:

> *… protect, restore and provide for the ecological values and ecosystem services of the Murray-Darling Basin (taking into account, in particular, the impact that the taking of water has on the watercourses, lakes, wetlands, ground water and water-dependent ecosystems that are part of the Basin water resources and on associated biodiversity); …*

12. The concept of EWR is reflected in the definition of 'environmentally sustainable level of take' in section 4 of the Water Act which, for a water resource, means 'the level at which water can be taken from that water resource which if exceeded, would compromise: (a) key environmental assets of water resource; or (b) key ecosystem functions of the water resource; or (c) the productive base of the water resource or (d) key environmental outcomes for the water resource.

13. The expression 'environmental outcomes' is defined in section 4 of the Water Act to include ecosystem function, biodiversity, water quality and water resource health.

14. Section 20 of the Water Act recognises that one of the purposes of the Basin Plan is to provide for the integrated management of the Basin in a way that promotes the objects of the Act by providing for the use and management of the Basin water resources that optimise economic, social and environmental outcomes. Whilst there is no reference in section 20 of the Water Act to climate change, the Murray Darling Basin Authority (**MDBA**) has identified that, under existing water management arrangements, climate change will disproportionately impact non-entitlement water which makes a significant contribution to environmental outcomes.[9]

15. The AEPLG considers that decision-makers responsible for water resource management under the Water Act should have regard to the challenges presented by climate change in maintaining the EWR of a river by including, as an object in s 3 of the Water Act (and a purpose in section 20 of the Act), an express reference to 'a drying climate' in the context of 'environmental water requirements' and/or 'environmental outcomes'.

16. Whilst the AEPLG does not propose to comment on the extent to which the objects of the Water Act have been achieved, it observes that on 16 January 2026 the Australian Government listed the River Murray downstream of the Darling River (and associated aquatic and floodplain systems) ecological community as 'Critically Endangered' under the *Environmental Protection Biodiversity Conservation Act 1999* following a recommendation from the Threatened Species Scientific Committee.[10]

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[9] *Water Act Review Discussion Paper,* https://www.dcceew.gov.au/sites/default/files/documents/water-act-review-discussion-paper-july-2026.pdf, p. 40.

[10] https://www.environment.gov.au/cgi-bin/sprat/public/publiclookupcommunities.pl

Proposed amendments to s 3 (objects clause)

17. The object in section 3(c) of the Water Act refers to 'environmental outcomes' when giving effect to international agreements: that is, to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes.

18. The AEPLG suggests that an additional object could be included in section 3 of the Water Act as follows:

> *to ensure that the use and management of Australia's water resources account for a drying climate, meet ecological water requirements and achieve environmental outcomes;*

19. The AEPLG considers that the reference above to 'Australia's water resources' as opposed to 'Basin water resources' is appropriate to acknowledge the impact of climate change on all Australian water resources.

20. The AEPLG notes that in Western Australia the *Rights in Water and Irrigation 1914* (WA) (**RIWI Act**) sets out specific objects in s 4 of the RIWI Act which are relevant to the exercise of functions under Part 3 of the RIWI Act. Part 3 vests the right to use and control water in the Crown and provides for the taking of water from a watercourse, including by a licence granted under section 5C. Notably, section 4(3) of the RIWI Act provides:

> *The Minister is to seek to ensure that the objects stated in subsection (1) are achieved, and other persons are to do so to the extent that they have relevant functions under this Part.*

21. The AEPLG suggests that a similar provision could be included in s 3 of the Water Act to help ensure that its objects are given greater weight by decision-makers when exercising functions under the Water Act.

22. Inserting such a provision may better achieve the existing (and any new) objects of the Water Act which include recognising the knowledge, traditions and customs of Indigenous people in the management and use of Basin water resources.

Contact

23. The AELPG would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact AEPLG Chair Charmian Barton [redacted].

Yours sincerely



Greg McIntyre SC
Section Chair