

## EDO Briefing Paper

# The proposed Murray-Darling Basin Plan

## What is the Murray-Darling Basin Plan?

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Until 2007, State Governments had sole legal responsibility for water regulation due to the division of responsibility in the Constitution. Because of this, management of the Murray-Darling Basin (**the Basin**) developed into a complex sharing of power between Murray-Darling Basin States and the Commonwealth, based on a consensus model that favoured a 'lowest common denominator' approach.

In 2007 all Murray-Darling Basin States and the Commonwealth Government agreed that the Commonwealth should have some power to regulate water in the Murray-Darling Basin. The Commonwealth Government's National Plan for Water Security, which proposed the Commonwealth intervention, stated that this was needed because:<sup>1</sup>

- 'The water resources of the Murray-Darling Basin...are significantly over-allocated. State and territory governments have in a number of catchments issued more entitlements to water than can be supplied on a sustainable basis.'
- Existing multi-state management, through the Murray-Darling Basin Agreement, was 'unwieldy, and not possible of yielding the best Basin-wide outcomes'.
- 'Protracted drought and the prospect of long term climate change [means] we need radical and permanent change in our water management practices'.

It was also recognised that the Commonwealth had significantly more resources to apply to the problem than the States did, in the form of \$10 billion. The Commonwealth's approach was designed to 'address once and for all water over-allocation in the Murray-Darling Basin'.<sup>2</sup>

In 2007 the Commonwealth passed the *Water Act 2007* (**Water Act**) with bipartisan support, as well as the support of all major stakeholders (apart from Victoria) including irrigation and farming bodies.<sup>3</sup> It was amended in 2008, again with bipartisan support, and the support of all Murray-Darling Basin States. The Water Act is based partly on the Commonwealth's own constitutional powers, and partly on a referral of powers from State governments. The Water Act sets up the Murray-Darling Basin Authority (**MDBA**) and requires the MDBA to make a Murray-Darling Basin Plan (**Basin Plan**) as soon as possible.

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1 Commonwealth Government, *A National Plan for Water Security*, 25 January 2007

2 Commonwealth Government, above n 1.

3 See, for example, the 2007 Senate Committee report into the Bill which states that there was 'broad support' for the Bill amongst stakeholders including farming and irrigation bodies. For example the committee noted that the National Farmers Federation was 'positive about the Bill and the process leading up to it'. Victoria was the only State that did not support it. *Standing Committee on Environment, Communications, Information Technology and the Arts report on Water Bill 2007 [Provisions]*, August 2007 esp p7 and p13. [www.aph.gov.au/senate/committee/ecita\\_ctte/completed\\_inquiries/2004-07/waterbill\\_2007/report/index.htm](http://www.aph.gov.au/senate/committee/ecita_ctte/completed_inquiries/2004-07/waterbill_2007/report/index.htm).

The key purpose of the Water Act is to return extraction in the Basin to sustainable levels for the long term, to support both the ecosystems that depend on the Basin and the continued productive use of the Basin. The Water Act is based on a recognition that long-term social and economic values depend on environmental health. The aim of the Basin Plan is to manage water resources in the Basin in a way that is environmentally sustainable, protects ecosystems, improves water security for all uses of Basin water resources, and allows efficient trade so that water can go to its most productive use.<sup>4</sup>

Importantly, the Water Act and the Basin Plan do not replace State water laws – they set an overarching framework and high level requirements that the States must then meet in management of water resources in their State. States can continue to manage water according to their own legal regimes, but they must now meet the requirements of the Water Act and the Basin Plan.

In order to comply with the Water Act, States will need to make water resource plans for each catchment and groundwater system in the Basin, which must comply with all the relevant parts of the Basin Plan.

## Why is the Basin Plan important?

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The Basin Plan is the key component of the Water Act. Although it is called a ‘plan’ it is actually a legislative instrument (like regulations) and is legally binding on Basin States, Commonwealth agencies, and individuals. Because it is of legal character it must comply with the legislation that creates it. The MDBA has the authority to prepare the Basin Plan, and is also subject to the constraints and requirements set out in detail in the Water Act.

The most important thing that the Murray-Darling Basin Plan does is set a binding cap on the amount of water that can be removed from Basin water resources (groundwater and surface water) for ‘consumptive use’ (farming, irrigation, drinking and so on). This is called the sustainable diversion limit (**SDL**). The aim of the SDL is to return extraction levels in the Basin to sustainable levels, in order to protect water dependent ecosystems, protect drinking water (in particular, Adelaide’s) and ensure that farming and irrigation activities can continue in the long term. The SDL is actually made of up separate SDLs for each water resource area – added together they make up the SDL for the whole Basin.

## What are the key elements of the proposed Basin Plan?

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In November 2011 the MDBA released a [proposed Basin Plan](#)<sup>5</sup> for public comment. It is open for 20 weeks’ consultation, ending 16 April 2012.

The draft Basin Plan recommends that 2750GL be returned to the system (that is, taken out of consumptive use). The Commonwealth and States could have achieved the SDLs by reducing entitlements (which may have required some level of compensation payment for any acquisition of property rights). However the Commonwealth has decided not to make mandatory reductions to entitlement and instead to achieve the reductions by buying back the water from willing sellers and paying for irrigation infrastructure upgrades. States will not have to comply with the SDLs until 2019, by which time the MDBA estimates all the water will be recovered through buybacks or infrastructure upgrades and the States will not be required to make any further reductions.

The Basin Plan also contains:

- an environmental watering plan which sets up a framework for how environmental water will be used;
- a water quality and salinity management plan which sets up a framework for managing water quality in the Basin;
- water trading rules; and
- a requirement for the MDBA to review the SDLs in 2015 to see if they should be shifted up or down. This could lead to an amendment of the Basin Plan.

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<sup>4</sup> *Water Act 2007* s21.

<sup>5</sup> [www.mdba.gov.au/draft-basin-plan](http://www.mdba.gov.au/draft-basin-plan).

## Does the draft Basin Plan comply with the Water Act?

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In our view the draft Basin Plan does not comply with the Water Act in a number of respects. Although the Water Act gives the MDBA some discretion in how it goes about making the Basin Plan, there are some clear requirements in the Water Act that the MDBA must meet.

The Water Act and the Basin Plan are based on a recognition that current extraction levels are unsustainable and have been for a long time, and that this is causing environmental degradation, impacting on human use of the water (for example, through salinity) and affecting water security for all users. The whole purpose of the Basin Plan is to return extraction to sustainable levels to fix those problems. Thus, reducing extraction levels is not just about 'giving water to the environment'; it is an attempt to make extraction sustainable to ensure the health of Basin ecosystems *and* to ensure human use of the water resources can continue.

In this way, the Water Act makes achieving sustainable extraction levels a foundational issue that will ultimately benefit the environment and water users. This can't be achieved by 'balancing' environmental, social and economic factors as if they were separate interests. The 'balancing' misconception in the draft Basin Plan is a failure to comply with the Water Act.

Unfortunately the MDBA has missed many opportunities to make the Basin Plan stronger – the Water Act certainly allows the Basin Plan to be stronger in a number of areas but the MDBA has chosen not to take those opportunities in the current draft Basin Plan. An example of this is the failure to make binding water quality and salinity targets. Other examples are discussed below. This can still be rectified in the final Plan however.

## What are the key problems and weaknesses in the draft Basin Plan?

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### Determining environmental water requirements

As noted above, the Basin Plan must set sustainable extraction limits for the Basin. To do this the Water Act requires that:

- the MDBA calculate the 'environmentally sustainable level of take' (ESLT) for the Basin. Essentially this is the level of water that can be taken out of the system for human use without compromising the environment; and
- the Basin Plan give effect to our obligations under treaties such as the Ramsar Convention and the Convention on Biodiversity.

Both of these should be reflected in the SDLs. Provided that these requirements are met, the SDLs should also be set in a way which achieves the best social and economic outcomes (known in the Water Act as **optimisation**).

There appear to be two main flaws with the way the MDBA has calculated the SDLs:

- 1) it has prioritised concerns about possible negative social and economic impacts above the question of what is sustainable; and
- 2) it has set SDLs that appear likely to compromise many parts of the environment.

The Water Act requires the SDLs to be based on levels of extraction that are sustainable in the long term. This concept has two elements – protecting and restoring the natural environment that depends on the water resources; and returning the system to a state where human use (farming, drinking water and so on) can continue indefinitely without being impacted by negative effects such as salinity or algal blooms.

The Water Act states that the SDLs should be based on an assessment of the amount of water that must stay in the system to achieve this long term sustainability and that this assessment must be based on best available science. Once a determination has been made of what is sustainable, then the MDBA can consider how to achieve that SDL in a way that

optimises social and economic outcomes. However, the Water Act does not allow the consideration of what is sustainable to be compromised by downgrading the SDLs to avoid negative socio-economic impacts.<sup>6</sup>

There are many provisions in the Water Act that consider socio-economic impacts and provide ways to minimise any negative impacts on those affected. This includes transitional provisions allowing SDLs to be phased in over a number of years, as well as lag time for water resource plans to come into force. In addition the Commonwealth has agreed to buy back or pay for irrigation upgrades for all water needed to achieve the SDLs, thereby significantly reducing the impact on water users, and has committed to many other regional assistance measures to reduce the impact of the reforms. In fact the Commonwealth has the power to put in place all sorts of regional transitional support, as evidenced by its commitments to date. But reducing the SDLs to avoid negative socio-economic impacts is not one of the options provided to it by the Water Act.

Further, the SDLs as set are not meeting the environmental targets. The MDBA developed environmental targets that should be met in order to meet the requirements of the Water Act. It commissioned the CSIRO to review the validity of the targets and whether they would be achieved with the proposed SDLs.<sup>7</sup> The CSIRO review states that the SDLs that the MDBA is proposing do not achieve the majority of the targets, and that the MDBA should model higher SDLs in order to properly assess what higher SDL levels could achieve. The report states ‘the proposed SDLs would be highly unlikely to meet specified ecological targets even in the absence of future climate change’.<sup>8</sup> CSIRO also states that it is not clear how the proposed SDLs were arrived at, but presumes it was because of socio-economic considerations.

The Water Act does not allow the environment to be compromised in this way – it is contrary to both the intent and the letter of the Water Act. The Water Act clearly provides that the Basin Plan and SDLs must be set at sustainable levels that protect and restore key parts of the environment.<sup>9</sup> The MDBA has identified what those key parts are through its environmental targets, but the SDLs it proposes will fail to meet the majority of them according to CSIRO. This does not comply with the Water Act.

## Water quality and salinity targets

The targets to ensure water quality and salinity are at acceptable levels throughout the Basin are not binding.

A previous draft of the Basin Plan contained binding targets but this was reportedly changed at the request of the Victorian and NSW governments who believe that these would be too hard to meet and would unduly restrict their activities.

This is a very disappointing situation. There is a golden opportunity to implement Basin-wide salinity and water quality targets for the benefit of the whole Basin available under the Water Act that has been let go by the MDBA.

## Compliance

The compliance provisions in the Basin Plan are weak.

One major concern is that States will only be considered to be non-compliant with the SDLs if they have exceeded these by more than 20% in a given year and if they do not have a reasonable excuse.<sup>10</sup> There are two problems with this:

- 1) 20% is a huge compliance buffer – a State could exceed its SDLs in every water resource area by 19% every year and still be compliant with the Basin Plan, and
- 2) if States exceed the SDL by more than 20% but have a ‘reasonable excuse’ they cannot be considered to be non-compliant.

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<sup>6</sup> This is evidenced by the way the provisions on SDLs are worded – s21 item 6, s23 and the definition of ‘environmentally sustainable level of take’ in s4, and supported by the objects and purposes of the Water Act and Basin Plan in ss3, 20, and 21.

<sup>7</sup> CSIRO Science Review of the Environmentally Sustainable Level of Take for the Murray-Darling Basin November 2011 [http://download.mdba.gov.au/proposed/CSIRO\\_ESLT\\_Science\\_Review.pdf](http://download.mdba.gov.au/proposed/CSIRO_ESLT_Science_Review.pdf).

<sup>8</sup> CSIRO review, above n 7, p. 30.

<sup>9</sup> See s23 and the definition of ‘environmentally sustainable level of take’ in s4; and s21(1)-(3).

<sup>10</sup> Proposed Basin Plan, clause 6.13.

Having such a provision ‘hardwired’ into the Basin Plan is a mistake. The SDLs should be binding on all States with 0% leeway, with discretion for the MDBA to be flexible up to 20% if the State has a reasonable excuse. Otherwise States could exceed the SDL by up to 19% every year with no excuse and still be compliant, or exceed the SDLs by 20% or more but still be deemed compliant if they offer an excuse.

Another problem area is in Chapter 9, which sets out what the State water resource plans must contain in order to be compliant. This Chapter contains a provision that weakens the entire Basin Plan. It says that States must meet the requirements of Chapter 9 of the Basin Plan in a way that will not change the reliability of existing water allocations; *but*, if the State cannot do so, the State can ignore those requirements of Chapter 9 which are causing the problem for it.<sup>11</sup> This is based on an agreement between the Commonwealth and Basin States that the reliability of existing entitlements will not be threatened by the Basin Plan. Nonetheless it is an extraordinary provision which undermines many of the other provisions of the Basin Plan. This provision is not required by the Water Act and greatly weakens the Commonwealth’s role in the process.

A further problem with compliance is that the Basin Plan allows each State to determine its own method for showing that it is complying with the SDLs, including developing its own model.<sup>12</sup> This will make it nearly impossible to compare compliance across States without significant technical expertise. It also means States can develop whichever method puts them in the most favourable light. A standardised approach put forward by the MDBA would decrease confusion and improve consistency.

## Other legal issues with the draft Basin Plan

There are a number of other legal issues with the draft Basin Plan which we will set out in full in the EDO submission to the MDBA.

## How to make a submission

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The Proposed Basin Plan is open for public comment until 16 April 2012. You can make submissions online. Details are on the [MDBA website](#).<sup>13</sup>

The EDO will release its submission at least a month before the due date so that you can see our concerns in detail.

## What happens next?

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After the submission period is over, the MDBA must review all submissions, make any changes it thinks necessary and then present a final Basin Plan to the Commonwealth Water Minister. The Minister can decide whether to adopt it, or send it back to the MDBA for amendment. The Minister has the power to direct the MDBA to make certain changes, including to the SDLs. Once the Minister adopts the Basin Plan he must table it in both Houses of Parliament. Either House can disallow (reject) the Basin Plan within 15 sitting days if a majority of the House votes to do so.

If the Basin Plan is allowed, States must make water resource plans that comply with the Basin Plan. The water resource plans will come into force progressively between 2014 and 2019.

The Basin Plan will remain in force for 10 years after which time the MDBA must review it (although the MDBA can review earlier, and has said it will review at least the SDLs in 2015).

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11 Proposed Basin Plan, clause 9.09.

12 Proposed Basin Plan, clauses 9.12, 9.13 & 9.20.

13 [www.mdba.gov.au/have-your-say/make-submission](http://www.mdba.gov.au/have-your-say/make-submission).

## Final thoughts

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The issue that is repeatedly lost in the heated discussion that surrounds the Basin Plan is what the Water Act and Basin Plan were originally designed to achieve and what they are trying to achieve now – a Basin-wide approach to returning water extraction in the Basin to sustainable levels so that it can remain healthy and productive indefinitely.

There are two elements to this. The first is the once-only opportunity to return extraction to sustainable levels – essentially to get ‘the numbers’ right. The other is to develop robust and resilient planning mechanisms to make sure the system then stays healthy and productive; mechanisms that respond to increasing knowledge and a changing environment, particularly in the face of climate change.

Regrettably the draft Basin Plan fails on both fronts: by compromising on the SDLs, the MDBA is not only missing the opportunity to return extraction to sustainable levels but is undermining the intent and integrity of the Water Act and with it the development of robust and resilient institutional arrangements.

The MDBA still has the chance to improve the Basin Plan to address the issues outlined here at the conclusion of the public consultation process. If they do not do so the Commonwealth Water Minister should use his powers under the Water Act<sup>14</sup> to direct the MDBA to make these changes.

Achieving sustainability in the Basin can only be done if water extraction is *actually reduced to sustainable levels*. Failure to do so will mean that the environment will continue to decline, and that all water users in the Basin will continue to face uncertainty and threats to their water use, particularly during times of drought. The Basin Plan is the best chance to make the much-needed shift to a sustainable and healthy Basin.

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<sup>14</sup> Water Act 2007 s44.

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