

# Submission

in response to

## Water Bill Exposure Draft

prepared by

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# 1. Introduction

The EDO has considerable experience advising on water law and water management reform at both the state and federal level. It was involved in the green and white paper processes<sup>1</sup> conducted prior to the 2005 amendments to the *Water Act 1989 (Act)* and reviewed, advised on and commented on the *Water Act 2007 (Cth) (Cth Water Act)* and the Murray-Darling Basin Plan (**Basin Plan**) as they were developed.

This submission is not an exhaustive statement of all our concerns with the Water Bill Exposure Draft (**Water Bill**). Instead we focus on four key areas of concern – the removal of the environmental water reserve; the lack of environmental requirements in the Bill; the removal of the long term water resource assessment; and problems with water resource management orders.

## 2. General Comments

The Water Review is a missed opportunity to bring Victoria's water management system into line with current thinking on sustainable water management. The concepts to achieve sustainable water allocation in the Commonwealth Water Act and Murray-Darling Basin Plan (which will effectively regulate water management in northern Victoria) could have been used to ensure the whole of Victoria is managing and using water sustainably. Instead there is a notable dearth of environmental and sustainability requirements in the Water Bill.

It is illogical that new water legislation would fail to include sustainable water management at its core, given the current status of water management in Australia, the unprecedented demand for water resources, the degraded state of many of our water systems and the growing impact of climate change on water availability and reliability. Instead the Water Bill only includes environmental and sustainability requirements as non-binding objects and considerations, and places no meaningful requirement on the government, the Minister or water authorities to ensure water is managed sustainably for the environment and all water users.

## 3. Environmental Water Reserve and environmental outcomes

### *Environmental Water Reserve*

The abandonment of the Environmental Water Reserve (**EWR**) in the Water Bill is a significant backwards step in environmental water management. The inclusion of the EWR in the *Water Act 1989 (Water Act)* in 2005 was an important move to recognise the value and need for water that is specifically dedicated to the preservation of environmental values and health of ecosystems. The bundling up of entitlements and conditions into an EWR and providing an objective for that water gave it a name and a focus for planning and decision-making. Further, provisions throughout the Water Act impose an obligation on decision-makers to ensure the EWR is maintained and protected in accordance with the EWR objective, and give water managers powers to take action to protect it.<sup>2</sup>

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<sup>1</sup> Victorian Government Department of Sustainability and Environment White Paper *Our Water Our Future* (2004).

<sup>2</sup> See for eg Water Act s7(4), s22(1)(c),s32, s46(5)

The EWR concept should be built upon and strengthened, not abandoned. Replacing the EWR with a simple definition of 'environmental water' consisting of held and planned environmental water<sup>3</sup> with no associated objective or obligations constitutes a backward step. Although the 'core considerations' in the Water Bill<sup>4</sup> require decision-makers to consider impacts on environmental water and environmental health in certain decisions, this requirement is considerably narrower and weaker than the requirements currently in the Water Act.

For example, there is no longer:

- a positive obligation to ensure that environmental water be maintained to preserve the environmental values and health of water ecosystems<sup>5</sup>;
- an obligation to refuse an application for a water licence if it is likely to have an adverse effect on maintaining environmental water<sup>6</sup>;
- an requirement on the Minister to refuse a transfer of a bulk entitlement or licence if the transfer is likely to have an adverse effect on maintaining environmental water<sup>7</sup>

**The Water Bill should provide legal recognition of and protection for all environmental water by:**

- **Retaining and extending the EWR concept;**
- **Defining the EWR as planned environmental water, held environmental water and any other water that contributes to the preservation of environmental values and health of water ecosystems;**
- **Including an objective of the EWR to – “restore and maintain the environmental values and health of water ecosystems, including their biodiversity, ecological functioning and quality of water and the other uses that depend on environmental condition.”**
- **Requiring that enough water be included in the EWR to meet environmental objectives (discussed below)**

#### *Environmental Outcomes*

The Water Bill does not require any environmental outcomes to be met to protect water sources and their dependent ecosystems. This is contrary to the National Water Initiative (**NWI**) which requires the provision of 'a statutory basis for environmental outcomes in surface and groundwater systems to protect water sources and their dependent ecosystems'.<sup>8</sup> The Water Bill therefore does not currently comply with the NWI.

The requirement to consider the 'core considerations' when making certain decisions in the Water Bill is the only real environment or sustainability requirement in the entire Bill. Alarmingly, as the only environmental requirement in the Bill, they fall far short of what would be expected in modern water legislation. In particular:

- The core considerations only require decision-makers to *consider* impacts on environmental water and other water that contributes to the preservation of the environment; and the

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<sup>3</sup> Water Bill Dictionary

<sup>4</sup> Water Bill s 5

<sup>5</sup> Water Act s4B

<sup>6</sup> Water Act s55(2B)

<sup>7</sup> Water Act s46(5) and s62

<sup>8</sup> National Water Commission, *Intergovernmental Agreement on a National Water Initiative* (2004) CI 25.

need to preserve environmental values and health.<sup>9</sup> There is no obligation to actually preserve environmental values or to prevent adverse effects on environmental water. Provided a decision-maker has considered those impacts, he/she can proceed with a decision that clearly harms environmental values or environmental water.

- The core considerations only include the need to *preserve* environmental values and health of water ecosystems.<sup>10</sup> There is no mention of the need to restore values and health in degraded systems – essentially maintaining the status quo.

The objects of the Water Bill also provide little assistance. Section 4(d) aims to provide a system of water resource management that '*balances* environmental, economic, social and cultural values'. This provision will provide absolutely no assistance to anyone trying to manage water in Victoria as its meaning is contestable and it is impossible to achieve (as was demonstrated in the Murray-Darling Basin process). As the primary environmental objective, section 4(f) is weak in that the object is to "*provide formal means for the preservation and improvement of the environmental values and health of water ecosystems*" rather than to actually preserve and improve them.

As discussed under Part 5 below, there is also no requirement for planned environmental water or caps on extraction to be based on any sustainability criteria whatsoever. Rather they will likely just reflect business as usual.

**The Water Bill should set out the environmental outcomes which must be met to protect water sources and preserve and restore the environmental values and health of water ecosystems including their biodiversity, ecological functioning and water quality.**

## 4. Reviews, assessments and permanent qualification

### *Three step resource assessment process*

The Water Bill replaces the Sustainable Water Strategies and long term water resource assessment/review process with a three step review process – a regional resource assessment, strategic review, and targeted review.<sup>11</sup>

The long term water resource assessment was included in the Water Act in 2005 in order to ensure that, every 15 years, an independent review will check on the health of water resources and any long term decline in water availability, and determine what actions must be taken.<sup>12</sup> In particular the review is required to determine whether any long term decline in water availability has fallen disproportionately on the environment water reserve or consumptive water. The Water Act put an onus on the Minister to implement identified actions, including if necessary a permanent qualification of rights.<sup>13</sup> This review and determination of actions is particularly important in light of climate change and the clear evidence that weather patterns are shifting to a greater extent than historical natural variability.<sup>14</sup>

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<sup>9</sup> Water Bill s5

<sup>10</sup> Water Bill s5(b)

<sup>11</sup> Water Bill Parts 2.3, 2.4 and 3.5

<sup>12</sup> Water Act Part 3 Div 1C

<sup>13</sup> Water Act s22P and 22V

<sup>14</sup> See for example D. Karoly & S. Lewis, 'Australia's hottest year no freak event: humans caused it' in *The Conversation* <https://theconversation.com/australias-hottest-year-was-no-freak-event-humans-caused-it-21734>

While the new review and assessment process has some positive features, overall it will weaken the ability of the government to address long term water resource problems and will further entrench over-allocation in stressed systems.

Some of the problems and solutions are set out below.

The purpose of the resource assessments has been narrowed and no longer includes a requirement to review any deterioration of waterway health. Instead they now only focus on long term risks to reliability and quality of water.<sup>15</sup>

**Sections 21 and 26 should be amended to reinstate deterioration of water health as a purpose of the assessments.**

### *Regional resource assessments*

The regional resource assessment is supposed to be a factually based review of risks to water reliability and quality. It should be an independent health check, based on science, which does not involve political judgement or bias. It should therefore be conducted by an independent expert panel. Instead under the Water Bill the Minister conducts the assessment with advice of a panel and the Minister can change the contents of the report provided to him/her by the panel. This is not appropriate or necessary.

An expert panel to conduct the regional resource assessment, free of interference from the Minister. Ministerial involvement at the strategic review stage is more appropriate (as the Bill currently provides for).

Further, the requirements as to who should be appointed to the regional resource assessment panel are not sufficient. The explanatory documents for the regional resource assessment state that the panel appointed to advise him/her will be an 'expert panel'. This is appropriate as the regional resource assessment should be based on independent science without input from vested interests. However there is nothing in the Water Bill to ensure this panel is in fact made up of experts. Section 779 just says that panel must have 'knowledge of or experience in matters to be considered by the panel'. The panel therefore could be made up entirely of local water entitlement holders who have an interest in ensuring that no recommendations are made that are adverse to their interests.

- **Part 2.3 should be changed to allow an expert panel to conduct the regional resource assessment, free of interference from the Minister.**
- **Section 779 must be changed to ensure that the panel is made up, at least primarily, of independent scientific experts, including people with experience in climate change. Local knowledge can be incorporated by including one or two people with local knowledge to the panel, and via the public comment process.**

### *Strategic reviews*

Similarly the strategic review requires the Minister to appoint an 'advisory committee'. Section 29 provides that the committee is comprised of members who have knowledge of or experience in the matters to be covered by the review and that all relevant interests are fairly represented, including

<sup>15</sup> See Water Act s22L of Water Bill s21 & 26

persons who represent the relevant community and holders of affected water entitlements. This will only automatically include the Victorian Environmental Water Holder (**VEWH**) in systems that have environmental entitlements. Further, the Minister has an 'out' because section 29 says that this diverse make-up only has to happen 'in so far as possible'.<sup>16</sup>

The Water Bill does not require the Minister to proceed with a strategic review after a regional resource assessment, even if the expert panel recommends it. Instead the Minister can refuse to proceed, provided he/she gives reasons.<sup>17</sup> This is a very easy hurdle to get over if for political reasons the Minister does not want to continue the review.

- **To ensure that advisory committees do fairly represent all relevant issues and conduct assessments that are in the best interests of the State, section 29 should include a requirement for equal representation from people with environmental and indigenous interests as well as scientific expertise**
- **The words 'in so far as possible' should be removed from section 29.**
- **The Minister should be *required* to conduct a strategic review if the panel of the regional resource assessment recommends one, and have discretion to proceed with one if the recommendation is not made.**

#### *Targeted reviews & permanent qualification*

In instances where there has been a long term decline in water availability, or quality, or river health, a permanent qualification to entitlements may be the only way to redress it for the benefit of the whole system. The only way a permanent qualification can be made is if a targeted review is conducted. However the way the Water Bill is currently drafted, it is highly unlikely the Minister will ever do a targeted review and even less likely that a permanent qualification will be made, however necessary. This is because:

- The Minister is not required to proceed with a targeted review even if the strategic review committee recommends it. The Minister only has to consider recommendations of the committee in making his recommendations.<sup>18</sup>
- The Minister himself may recommend that a targeted review be undertaken when doing a strategic review. However even if the Minister himself recommends it, the Minister does not have to follow through with it.<sup>19</sup>
- The current intent of the Bill is that the strategic review committee be made up of 'people representing affected interests'.<sup>20</sup> If the committee is primarily made up of affected water holders it is highly unlikely they will recommend a targeted review, knowing that this may well lead to their entitlements being permanently qualified.
- Even if the targeted review committee and the Minister conducting the targeted review recommend that permanent qualifications be made, the Minister does not have to do so.<sup>21</sup>

The purpose of the targeted review is to identify whether a decline in the availability of water is impacting on the health of the system, and assess options and propose measures for improving the health of the system.<sup>22</sup> This is a critical assessment which will not necessarily be covered in the

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<sup>16</sup> Water Bill s29(2)

<sup>17</sup> Water Bill s25(c)

<sup>18</sup> Water Bill s30

<sup>19</sup> Water Bill s47(1)

<sup>20</sup> Water Bill Exposure Draft – An Explanatory Guide p12

<sup>21</sup> Water Bill s55

<sup>22</sup> Water Bill s46

regional resource assessment or strategic review. It is akin to the long term water resource assessment & review in the Water Act which is currently mandatory every 15 years. The contentious nature of permanent qualification, and the likely fierce opposition to it from all entitlement holders means that it is highly unlikely a targeted review will ever occur if left to the discretion of the Minister, regardless of whether it is in fact in the best interest of the State. Targeted reviews should therefore be mandated every 17 years, to allow it to take into account the results of regional resource assessments, or earlier if the Minister deems necessary. Failure to do so will weaken the ability of the government to address long term water resource problems and will further entrench over-allocation in stressed systems.

In addition, there is no requirement for the Minister to implement any of the recommendations of the targeted review, despite the fact that this is the third step in a very exhaustive review process, and significant amounts of time and expertise would have been investing in developing recommendations. The Minister should be required to implement the recommendations of the review, unless he/she provides reasons to Parliament why they should not be implemented.

**To ensure Victoria is able to proactively manage any long term decline in water resources, targeted reviews should be mandated every 17 years (following the regional resource assessments) or earlier if the Minister deems necessary.**

**As per the strategic review, the advisory committee for the targeted review under section 49 should include a requirement for equal representation from people with environmental and indigenous interests, as well as scientific expertise, and should remove the words 'in so far as possible'.**

**The Minister should be required to implement the recommendations of a targeted review, unless he/she provides reasons to Parliament why they should not be implemented.**

## **5. Water Resource Management Orders**

The creation of water resource management orders (**WRMOs**) is a welcome addition to the Water Bill and should increase the understanding, transparency and consistency of the water management framework for all stakeholders.

WRMOs will form a critical part of Victoria's water management framework. They are legally binding and over time will contain many (if not all) of the system-wide rules for water. The absence of any sustainability measures in the Water Bill means that the only place such rules will reside is in WRMOs. This includes caps on extraction, provision for planned environmental water and water restrictions. It is therefore critical that the Water Bill itself include requirements to ensure such rules are based on sustainability criteria.

It is clear from the explanations provided by DEPI that any caps on water extraction in WRMOs such as those to replace permissible consumptive volumes (**PCVs**) will reflect current levels of extraction rather than attempt to ensure extraction is sustainable. Additionally there is no requirement for planned environmental water to be determined based on scientifically justified levels to protect and restore environmental health of water ecosystems, or prevent algal blooms or salinity. Instead it appears that they will continue to be set on an ad hoc (probably historic) basis.

The requirement to consider (and then potentially disregard) the core considerations when making a WRMO does not make up for this.

**Part 4.8 of the Water Bill should include requirements for planned environmental water and caps on extraction to be based on best available science in order to achieve sustainable extraction levels from all groundwater and surface water systems.**

A further concern is the ability for the Minister to make a 'water shortage derogation order' that will indefinitely suspend a WRMO, including rules for caps and planned environmental water. Although there are consultation provisions for the making of WRMOs, there is no requirement for the Minister to do public consultation or even a public notification when making a water shortage derogation order to suspend them.

**The Water Bill should require public notification and a short consultation period before a water shortage derogation order is made.**