

# EDOs of Australia



EDOs of Australia

## Submission to the Australian Law Reform Commission on *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws: Interim Report*

21 September 2015

EDOs of Australia (Australian Network of Environmental Defenders Offices Inc.) is a network of 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

Thank you for the opportunity to comment on *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws: Interim Report (Interim Report)*. Our comments are intended to build on our submission dated 27 February 2015 responding to the Freedoms Inquiry on *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Freedoms Inquiry)*.

EDOs of Australia is a network of independent community legal centres across Australia. We have extensive experience advising on the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*,<sup>1</sup> *Water Act 2007 (Water Act)* and Murray-Darling Basin Plan 2012 (**Basin Plan**).<sup>2</sup>

This submission responds to Chapter 8, 'Property- Real Property' and in particular the treatment of environmental laws under the subsection entitled 'Laws that interfere with property rights'.

EDOs of Australia wish to reiterate the view put forward in our previous submission that there is no evidence to suggest that Commonwealth environmental laws unduly encroach on property rights.

This submission will focus on the following matters raised in Chapter 8 of the Interim Report:

- 1) **Part One** will discuss the EPBC Act.
- 2) **Part Two** will discuss the Water Act.
- 3) **Part three** refers the ALRC to four submissions written by EDOs of Australia concerning the Water Act and Basin Plan. These submissions are attached as PDF documents.

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<sup>1</sup> Our submissions and briefing notes concerning the EPBC Act are available online at: [http://www.edonsw.org.au/native\\_plants\\_animals\\_policy](http://www.edonsw.org.au/native_plants_animals_policy)

<sup>2</sup> Our submissions and briefing notes concerning water law and policy are available online at: <http://www.edo.org.au/water1>

## Part 1 – EPBC Act

This part explains why the EPBC Act does not unduly encroach on private property rights. It considers the EPBC Act's limited application, Australia's international obligations, benefits to private landholders as a result of the Act, the Act's importance amid growing environmental challenges, and the existence of sufficient statutory review mechanisms.

### 1. Limited application

The EPBC Act is constrained in its application and where it does apply, it very rarely prevents development from being undertaken.

First, the core function of the EPBC Act is to protect matters of national environmental significance (**MNES**). Accordingly, any 'action' that is likely to have a significant impact on one of the 10 MNES must be assessed and approved under the EPBC Act. The requirement to have a 'significant impact' on a specified list of matters sets a high threshold for consideration under the Act. As a consequence, the vast majority of development proposals will only require assessment at a local or State level, which lies outside the scope of this Inquiry.

Second, the EPBC Act generally only regulates high-impact developments (such as mining operations or large infrastructure projects). It does not – contrary to what the interim report may suggest - regulate land clearing by farmers. To clarify, land clearing is regulated by State and Territory Governments – except in very rare instances where this clearing is likely to have a significant impact on a MNES.

Third, the majority of these actions are undertaken by large companies on land that has been purchased for the purposes of commercial exploitation. Private landholders wishing to undertake development on their residential lot (or farm) remain largely unaffected by the Act.

Fourth, the Minister is not required to refuse a development proposal because it is likely to have a significant impact on a MNES. Rather, the Minister may – and in almost all cases does – issue a conditional approval. Indeed, only 10 of the 732 matters requiring Ministerial assessment and approval under the Act have been refused.<sup>3</sup> In other words, the Act is not prohibitive or particularly restrictive in the way it is applied. Rather – and like most environmental legislation in Australia – it is based on a system of permits and approvals which authorise and mitigate activities with adverse environmental impacts.

Fifth, the Interim Report cites *Greentree v Minister for the Environment*<sup>4</sup> as a possible illustration of undue interference with private property rights. However, Mr Greentree was prosecuted by the Commonwealth for flagrantly breaching the EPBC Act (rather than applying for approval under the Act).

<sup>3</sup> Australian Government, *Department of the Environment Annual Report 2013-14*, p. 212.

<sup>4</sup> *Greentree v Minister for the Environment and Heritage* (2005) 144 FCR 388.

As *Greentree* involved a significant impact on an internationally significant wetland listed under the Ramsar Convention, we would argue that it in fact highlights both the restricted scope of the Act and the importance of enforcement under environmental legislation.

## 2. International obligations

It is well established that the Commonwealth is principally responsible for ensuring that 'international obligations relating to the environment are met by Australia.'<sup>5</sup>

The EPBC Act derives the majority of its constitutional validity from a series of bilateral and multilateral treaties to which Australia is signatory. In other words, it is the principal legislative vehicle chosen by the Commonwealth to implement Australia's international environmental obligations.

Proper implementation of these obligations necessarily requires a *minimum* level of regulation.<sup>6</sup> As noted above, the Act does not prohibit development. Rather, certain actions must be assessed and approved under the Act before development can lawfully commence. Thus an activity that will have a significant impact on a site protected under the World Heritage Convention,<sup>7</sup> or on listed threatened species or communities (for example)<sup>8</sup> may be approved under the Act.

To that end, it is difficult to argue that the requirement to obtain a permit for an action that is likely to have a significant impact on a matter protected under international law constitutes an undue burden on private property holders. This is particularly true when one considers that the Act principally regulates activities undertaken by large companies on land purchased specifically for the purpose of commercial development.

By way of contrast, it has been persuasively argued that Australia could and should be doing more to protect species and areas listed under international conventions; that the EPBC Act may fall short of properly implementing Australia's international environmental obligations.<sup>9</sup>

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<sup>5</sup> *Intergovernmental Agreement on the Environment* (1992). See cl. 2.2.1 (1).

<sup>6</sup> The High Court has held that a statute or instrument purporting to give effect to a treaty must be 'appropriate and adapted' to this task. See: *State of Victoria v Commonwealth* (1996) 187 CLR 416.

<sup>7</sup> See for example EPBC Act approval 2011/6213 for Abbot Point Terminal 0, Terminal 2, Terminal 3 - Capital Dredging, Queensland. This approval authorised dredging works that are likely to have a significant impact on the Great Barrier Reef Marine Park. Further information is available online:

[http://www.environment.gov.au/cgi-bin/epbc/epbc\\_ap.pl?name=current\\_referral\\_detail&proposal\\_id=6213](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=6213)

<sup>8</sup> See for example EPBC Act approval 2014/7202 for the Esso Pipeline Replacement Project, Victoria. Further information is available online: [http://www.environment.gov.au/cgi-bin/epbc/epbc\\_ap.pl?name=referral\\_detail&proposal\\_id=7202](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=referral_detail&proposal_id=7202)

<sup>9</sup> See for example Haigh, David, *Australian World Heritage, the Constitution and International Law* (2005) 22 *EPLJ* 385.

### 3. Benefits and protections for private landholders

EDOs of Australia are of the view that the EPBC Act confers significant benefits on private landholders. For example, the Act enables the Minister to impose additional conditions on mining developments that have already been approved under State or Territory laws. These conditions may reduce impacts on neighbouring properties or the environment in general, particularly in relation to water resources.<sup>10</sup>

Further to this point, it is worth noting that the most recently added MNES, the so-called “water trigger”, was introduced following concern expressed by farmers about the impacts associated with coal seam gas and coal mining developments on aquifers and surface water.<sup>11</sup> In other words, the Act was amended for the express purpose of protecting a resource used by private landholders, in the knowledge that natural resources are interconnected and their value is shared.

Similarly, many of our clients have expressed concern about impacts on local biodiversity caused by mining operations which are regulated under the EPBC Act. While land owned by these individuals and groups may not be impacted by these developments, they nonetheless benefit from, and support the protection of, local flora and fauna.<sup>12</sup>

### 4. Environmental challenges

The most recent State of the Environment Report outlines the ongoing environmental challenges confronting Australia. These issues range from large scale land clearing, to overallocation of certain water resources, to declining biodiversity.<sup>13</sup> Given the scale of these challenges, and the fact that they are caused by human activity,<sup>14</sup> it is entirely appropriate for the Commonwealth to enact legislation to regulate certain classes of development.

Indeed, the State of the Environment Report explicitly states that ‘[o]ur environment is a national issue requiring national leadership and action at all levels.’<sup>15</sup> Focussed, results-driven national leadership is impossible in the

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<sup>10</sup> See for example Gloucester Coal Seam Methane Gas Project, Gloucester Region, NSW (EPBC Act approval 2008/4432). Available online: <http://www.environment.gov.au/epbc/notices/assessments/2008/4432/2008-4432-approval-decision.pdf> (accessed 16 September 2015).

<sup>11</sup> See Carmody, Emma and Ruddock, Kirsty, Coal seam gas and water resources: a case for Commonwealth oversight? *Australian Environment Review*, 2013. Vol 28 No 3, p. 501.

<sup>12</sup> See for example *Northern Inland Council for the Environment Inc. v Minister for the Environment* [2013] FCA 1418; *Northern Inland Council for the Environment Inc. v Minister for the Environment* [2013] FCA 1419. Case notes and full judgement available online: [http://www.edonsw.org.au/northern\\_inland\\_council\\_for\\_the\\_environment\\_v\\_minister\\_for\\_environment\\_maules\\_creek\\_and\\_boggabri\\_mine\\_cases](http://www.edonsw.org.au/northern_inland_council_for_the_environment_v_minister_for_environment_maules_creek_and_boggabri_mine_cases)

<sup>13</sup> State of the Environment 2011 Committee. *Australia state of the environment 2011. Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities*. Canberra: DSEWPaC, 2011, pp. 7-10 (‘Summary’)

<sup>14</sup> See also: Wentworth Group of Concerned Scientists, *Blueprint for a Healthy Environment and a Productive Economy*, November 2014.

<sup>15</sup> *Ibid*, p. 66.

absence of an appropriate legislative framework. The cornerstone of this framework is the EPBC Act.

## 5. Statutory review processes are sufficient

The Interim Report contemplates the possibility of further review of the EPBC Act to assess whether it unjustifiably interferes with real property rights.<sup>16</sup> EDOs of Australia do not believe that there is a *prima facie* case to be made in favour of such a review, or that such a review would be in the general public interest.

In the first instance, and as argued in the preceding sections, there is little evidence to suggest that the EPBC Act constitutes an undue burden on private landholders. Rather, and as we have demonstrated, the Act is only triggered in a limited set of circumstances, and applies in the overwhelming majority of cases to high impact developments undertaken by large companies on land purchased for commercial purposes.

Second, the EPBC Act requires the Act to be independently reviewed every 10 years.<sup>17</sup> The most recent review was undertaken in 2009 by an expert panel chaired by Dr Allan Hawke. This was an exhaustive and widely consultative report which resulted in 71 recommendations for reform to build on the Act and improve its efficiency and effectiveness.<sup>18</sup> The Panel did not find evidence that the Act constituted an undue interference with property rights. Rather than adding another layer of review and administration, there is a strong argument to be made in favour of revisiting and giving effect to Dr Hawke's recommendations.

## 6. Consensual arrangements

The Interim report also contemplates whether 'consensual arrangements with the property holders could deliver the policy outcomes so as to address both s. 51 (xxxi) issues and broader concerns about the effect on property rights.'<sup>19</sup>

EDOs of Australia do not believe that a consensual framework is workable or appropriate for actions regulated under the EPBC Act.

First, EDOs of Australia have consistently argued that high-impact development must be regulated by rigorous environmental laws underpinned by the principles of ecologically sustainable development (**ESD**). Administrative decisions made in relation to such development must also be subject to judicial review.

By way of contrast, consensual arrangements are likely to lack rigour, to be arbitrary in nature and unenforceable. It is also possible that such arrangements would remove the possibility of judicial review.

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<sup>16</sup> Interim Report, p. 247.

<sup>17</sup> EPBC Act, s. 522A.

<sup>18</sup> Hawke, A. (2009), *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, Final Report*, October 2009.

<sup>19</sup> Interim Report, p. 247.

Second, the EPBC Act regulates activities that are likely to have a significant impact on MNES. In our view, matters of national significance – which in most instances are protected under international treaties to which Australia is signatory – should not be managed pursuant to flexible, non-legal policy arrangements. Again, they should be protected by strong laws that are based on the principles of ESD, and which maintain the possibility of judicial review.

## Part 2 - Water Act

The following part of our submission explains why the Basin Plan and Water Act do not unduly encroach on private property rights. It outlines the environmental and management challenges which gave rise to the Water Act on the one hand, and the socio-economic considerations that have driven the development and implementation of the Basin Plan on the other (arguably to the detriment of the environment). It concludes that existing review processes are sufficient to assess the ongoing operation of the Act and Plan, including impacts on private interests, and that consensual arrangements are already provided for under the existing statutory framework.

### 1. Environmental and management challenges

Professor Richard Kingsford has described the Murray-Darling Basin as ‘the most developed river-drainage basin on the continent, with a long history of poorly integrated management by the States, which have often acted independently to the detriment of the environment.’<sup>20</sup>

The Murray-Darling Basin Authority (**MBDA**) summarises the history of this mismanagement in the following terms:

*Since European settlement of the Basin, our use of its resources has focused on securing water for our domestic and agricultural needs. We had little understanding of the water needs of the natural environment, and as a result, water has been over-allocated for human use.*

Signs of declining ecosystem health are numerous and include closure of the Murray Mouth in 1981 (and ongoing dredging since 2002 to keep the mouth open),<sup>21</sup> high levels of salinity in the Lower Lakes,<sup>22</sup> low native fish populations<sup>23</sup> and stressed forest and woodland areas (in particular river red gum and black box stands).<sup>24</sup> More generally, by 2007, 20 out of the 23 river systems across the Basin were assessed as being in poor or very poor health.<sup>25</sup> Future challenges

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<sup>20</sup> Kingsford, Richard et al, A Ramsar wetland in crisis – the Coorong, Lower Lakes and Murray Mouth, , Australia, *Marine and Freshwater Research*, 2011, 62, p. 256.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid, p. 258.

<sup>23</sup> Murray-Darling Basin Authority, *Sustainable Rivers Audit, The ecological health of rivers in the Murray-Darling Basin at the end of the Millennium Drought (2008-2010) – Volume 1*, pp. 121-139

<sup>24</sup> See for example: <http://www.mdba.gov.au/sites/default/files/pubs/stand-condition-report-2009.pdf> (accessed 21 September 2015).

<sup>25</sup> Davies PE, JH Harris, TJ Hillman and KF Walker 2008. *SRA Report 1: A Report on the Ecological Health of Rivers in the Murray–Darling Basin, 2004–2007*. Prepared by the

include managing the impact of past allocation decisions, population growth<sup>26</sup> and climate change.<sup>27</sup>

## 2. Water Act and Basin Plan – focus on socio-economic factors

Poor cross-jurisdictional management, overallocation of water resources and declining ecosystem health underpinned the Commonwealth's decision to introduce the Water Act in 2007.

The Water Act requires Sustainable Diversion Limits (**SDLs**) for Basin water resources to reflect an environmentally sustainable level of take (**ESLT**).<sup>28</sup> An ESLT for a water resource is the level of take which, if exceeded, would compromise any one of the following components of that water resource: its key environmental assets; key ecosystem functions; productive base; or key environmental outcomes.<sup>29</sup>

The Water Act further provides that the Basin Plan must be based on best available science,<sup>30</sup> and implement the 'relevant international agreements', which include the Ramsar Convention and Convention on Biological Diversity.<sup>31</sup> Establishing SDLs that reflect an ESLT is arguably the only means of properly giving effect to these treaties.

The wording of the Water Act clearly reflects this logic, indicating that the MDBA may only seek to optimise socio-economic outcomes after the ESLT and corresponding SDLs have been determined in accordance with the Act.<sup>32</sup>

However, the MDBA based the final SDL reduction figure of 2,750 GL/year on a mix of socio-economic, environmental and operational factors.<sup>33</sup> This analysis was corroborated by a Senate Committee report entitled 'Management of the Murray-Darling Basin'. Specifically,

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Independent Sustainable Rivers Audit Group for the Murray–Darling Basin Ministerial Council, p. xi.

<sup>26</sup> <http://www.mdba.gov.au/about-basin/basin-environment/challenges-issues> (accessed 21 September 2015).

<sup>27</sup> See generally: CSIRO, *Climate variability and change in south-eastern Australia: A synthesis of findings from Phase 1 of the South Eastern Australian Climate Initiative* (SEACI), 2010.

<sup>28</sup> Water Act, s. 23 (1).

<sup>29</sup> Water Act, s. 4 (definitions).

<sup>30</sup> Water Act, s. 21 (4) (b).

<sup>31</sup> Water Act, ss. 3 (b) (objects); 21 (1) (general basis on which Basin Plan to be developed).

<sup>32</sup> See Water Act, s. 23 (1) (SDLs). Furthermore, optimisation of socio-economic factors is only mentioned twice in the Water Act, and in both instances in non-operational sections: Water Act, ss. 3 (c) (objects); 20 (d) (Purpose of Basin Plan). Furthermore, the Act's objects make it clear that optimisation of social, economic and environmental outcomes is subject to proper implementation of the 'relevant international agreements': Water Act, s. 3 (b).

<sup>33</sup> ANEDO, Submission: Proposed Murray-Darling Basin Plan, 16 April 2012, p. 11. [http://www.edo.org.au/policy/120416mdbdraft\\_plan.pdf](http://www.edo.org.au/policy/120416mdbdraft_plan.pdf)



*The Committee is of the view that the 2750 GL/y figure may have been determined by the MDBA as a trade-off between the ecological targets and the socio-economic impacts of the Basin Plan.*<sup>34</sup>

The inclusion of an 'adjustment mechanism' in the Basin Plan also reflects a desire to minimise impacts on water entitlement holders. The mechanism allows the benchmark figure of 2,750 GL/year to be adjusted upwards or downwards by up to 540 GL/year.<sup>35</sup>

Briefly, the figure may move upward if 'efficiency measures' are implemented, thereby enabling more water to be delivered to the environment without reducing irrigators' allocations. Conversely, it may move downward if 'supply measures' are given effect, allowing less water to be delivered to the environment while delivering 'equivalent environmental outcomes'.<sup>36</sup>

Basin States have thus far focussed on developing supply measures, which will result in more water being available for consumptive use. A recent stocktake of proposed supply measure projects indicates that approximately 500 GL/year worth of water may be returned to the consumptive pool, with additional projects potentially adding to this figure.<sup>37</sup>

In summary, impacts on entitlement holders have been given full consideration under the Basin Plan. Indeed, it is arguable that interpretation of the Act and development of the Basin Plan have been driven by a strong desire to protect private interests to the greatest extent possible. This focus has compromised environmental outcomes across the Basin.<sup>38</sup> Specifically, it is unlikely that the mandated reduction figure (adjusted or otherwise) is consistent with the requirement to reinstate an ESLT.<sup>39</sup>

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<sup>34</sup> Senate Rural and Regional Affairs and Transport References Committee, Management of the Murray-Darling Basin, *Second Interim Report: the Basin Plan*, p. 32.

<sup>35</sup> *Ibid*, 7.19 (and Chapter 7 generally).

<sup>36</sup> *Ibid*, Chapter 7. It is important to note that the notion of 'equivalent environmental outcomes' is highly controversial. It is based on a scoring method outlined in Schedule 6 of the Basin Plan. This method assesses outcomes at a regional level (within a river reach) and to that extent involves environmental trade-offs. For example, a poor outcome for one species can be 'offset' by an improved outcome for another species located within the same reach of the river.

<sup>37</sup> <http://www.mdba.gov.au/media-pubs/publications/independent-stocktake-of-sdl-adjustment-measures> (accessed 16 September 2015).

<sup>38</sup> For example, under the 2,750 GL/year reduction scenario, 10 out of the 16 Ramsar-listed wetlands in the Basin will suffer a 'change in ecological character.' See La Nauze, J and Carmody, E, Will the Basin Plan uphold Australia's Ramsar Convention obligations? *Australian Environment Review*, September 2012.

<sup>39</sup> It was found that a 2,800 GL/year reduction scenario was 'not consistent with the currently stated environmental targets.' By way of background, meeting these targets is an integral part of reinstating an ESLT. See Young WJ, Bond N, Brookes J, Gawne B and Jones GJ, *Science Review of the Estimation of an Environmentally Sustainable Level of Take for the Murray-Darling Basin. A Report to the Murray-Darling Basin Authority from the CSIRO Water for a Healthy Country Flagship*, p. 29. See also: Wentworth Group of Concerned Scientists, *Statement on the 2011 Draft Murray-Darling Basin Plan*, January 2012.

These issues are explored in considerable detail in three submissions prepared by EDOs of Australia, all of which are attached as PDF documents in Part 3 of this submission.<sup>40</sup>

### **3. Cap on the purchase of water entitlements**

The Commonwealth Government has recently put forward a Bill seeking to limit the purchase of environmental water by the Commonwealth Environmental Water Holder (**CEWH**) to 1,500 GL/year.<sup>41</sup> By way of background, the purchase of entitlements is the principal – and most effective – means of returning water to the environment. The Bill, which has already been passed by the Senate, is underpinned by the assumption that the (entirely voluntary)<sup>42</sup> sale of entitlements to the CEWH has a negative impact on Basin communities.

In a submission to the Senate Standing Committee on Environment and Communications, EDOs of Australia objected to this Bill. Our submission covered seven key areas, including an analysis of the overall benefits to irrigators of the relatively new water market. As previously indicated, it is attached as a PDF document in Part 3 of this submission.

### **4. Water rights and compensation**

The Interim Report cites the National Farmer's Federation (**NFF**), according to whom the Basin Plan has 'the potential to 'erode' farmers' water rights and entitlements without full compensation...'<sup>43</sup> EDOs of Australia does not consider that this statement reflects the current statutory regime.

In the first instance, the relatively recent decision to unbundle water entitlements from land has created an entirely new asset which has in turn generated additional wealth for many landholders. That is, water markets have provided farmers with an income-generating option which simply did not exist prior to the introduction of the *Water Management Act 2000* (NSW) and equivalent interstate legislation.

Second, the Water Act expressly prohibits the compulsory acquisition of entitlements.<sup>44</sup> To that end, farmers who sell their entitlements to the CEWH do so voluntarily and (one may assume) following full consideration of the advantages and disadvantages of doing so.<sup>45</sup>

Third, the Water Act provides for entitlement holders to be compensated in certain circumstances where allocations are reduced due to the operation of the

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<sup>40</sup> These are: Submission responding to the Guide to the Proposed Basin Plan (2010); Submission responding to the Proposed Basin Plan (2012); Submission responding to the Water Amendment Act 2015 (2015).

<sup>41</sup> Water Amendment Bill 2015.

<sup>42</sup> The Water Act prohibits the compulsory acquisition of entitlements: s. 255.

<sup>43</sup> Interim Report, p. 231.

<sup>44</sup> Water Act, s. 255.

<sup>45</sup> For further analysis of this issue, please see our submission concerning the Bill proposing to limit the purchase of entitlements to 1,500 GL (attached as a PDF in Part 3 of this submission).

Basin Plan.<sup>46</sup> These provisions are to be considered in tandem with State laws, which also enable entitlement holders to be compensated (subject to meeting certain criteria) for reductions in allocations.<sup>47</sup>

Finally, it is important to note that water allocations are not fixed. Rather, they are impacted by a variety of factors, the most important of which are rainfall, the quantity of water in storages and the State's allocation policies. The security level of a given licence will also influence reliability of supply, particularly during drier periods. This being the case, it is difficult – indeed impossible – to argue that increasing the pool of environmental water has a more detrimental impact on allocations and entitlements than the aforementioned factors.

## 5. Statutory review processes are sufficient

The Interim Report contemplates the possibility of further review of the Water Act to assess whether it unjustifiably interferes with real property rights.<sup>48</sup>

First and foremost, EDOs of Australia is of the view that the existing statutory review processes are sufficient for assessing the operation of the Water Act and Basin Plan, including their impact on landholders and entitlement holders.<sup>49</sup> For example, the most recent review of the Water Act was undertaken in 2014, and addressed impacts on private property and entitlement holders.<sup>50</sup>

Furthermore, two recent Senate Inquiries have focussed on the socio-economic impacts associated with the Act and Plan, including impacts on entitlement holders.<sup>51</sup>

Finally, the MDBA continues to work with private landholders and communities on the development of the 'Constraints Management Strategy' (**CMS**). As noted by the MDBA, 'an important principle of the CMS is that any solutions to overcome constraints will recognise and respect the property rights of land holders and will not create any new risks to the reliability of water entitlements.'<sup>52</sup>

In short, potential interference with private property rights and water allocations under the Water Act and Basin Plan continues to be given full and proper consideration by the MDBA and pursuant to the mechanisms outlined above.

We therefore submit that an additional review designed to examine impacts on real property rights is unnecessary as it would duplicate existing statutory and

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<sup>46</sup> Water Act, Division 2 of Part 4.

<sup>47</sup> See for example the *Water Management Act 2000* (NSW).

<sup>48</sup> Interim Report, p. 247.

<sup>49</sup> Water Act, ss. 50, 253.

<sup>50</sup> The Review Report is available online at:

<https://www.environment.gov.au/water/legislation/water-act-review>

<sup>51</sup> Senate Communications and Environment Legislation Committee Inquiry into the Water Amendment Bill 2015; Select Committee on the Murray-Darling Basin Plan (see [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Murray\\_Darling\\_Basin\\_Plan/murraydarling/Terms\\_of\\_Reference](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Murray_Darling_Basin_Plan/murraydarling/Terms_of_Reference))

<sup>52</sup> <http://www.mdba.gov.au/what-we-do/water-planning/managing-constraints> (accessed 16 September 2015).

non-statutory review processes which tend to emphasise socio-economic assessment.

## 6. Consensual arrangements are already in place

As noted in Part 1 of this submission, the Interim report contemplates whether 'consensual arrangements with the property holders could deliver the policy outcomes so as to address both s. 51 (xxxi) issues and broader concerns about the effect on property rights.'<sup>53</sup>

A consensual approach has already been adopted by the CEWH in relation to environmental watering, and the MDBA in relation to constraints management.

First, the CEWH may not release environmental water onto private land in the absence of landholder consent.<sup>54</sup> As noted on the CEWH's website,<sup>55</sup>

***Negotiating consent:** If potentially unacceptable impacts on private property are identified we will negotiate with affected landholders to avoid or minimise any potential problems and obtain consent to watering events. In many situations landholders support watering events because the outcomes are mutually beneficial, such as by creating environmental benefits while also supporting the productivity of floodplain pastures.*

Second and as previously indicated, the CMS is underpinned by a consultative process which aims to mitigate or avoid unacceptable impacts on private property.

## Part 3 – Submissions prepared by EDOs of Australia

The following submissions have been attached as they provide additional information on the assessment of socio-economic impacts (include impacts on private landholders and allocations) under the Water Act and Basin Plan.



Figure 1 Submission on Guide to the Proposed Basin Plan

[http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/373/attachments/original/1380683952/101216mdb\\_guide.pdf?1380683952](http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/373/attachments/original/1380683952/101216mdb_guide.pdf?1380683952)



Figure 2 Submission on Proposed Basin Plan

<sup>53</sup> Interim Report, p. 247.

<sup>54</sup> Water Act, s.110 (2).

<sup>55</sup> <https://www.environment.gov.au/water/cewo/about/statutory-obligations> (accessed 21 September 2015).

[http://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/354/attachments/original/1380680559/120416mdbContext\\_draft\\_plan.pdf?1380680559](http://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/354/attachments/original/1380680559/120416mdbContext_draft_plan.pdf?1380680559)



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**Figure 3 Submission on 2014 Water Act Review**

[https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/1542/attachments/original/1406008769/140709\\_Water\\_Act\\_2007\\_review\\_ANEDO\\_submission\\_FINAL.pdf?1406008769](https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/1542/attachments/original/1406008769/140709_Water_Act_2007_review_ANEDO_submission_FINAL.pdf?1406008769)



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**Figure 4 Submission on Water Amendment Bill 2015**

[https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/2170/attachments/original/1438843517/EDOs\\_of\\_Australia\\_Submission\\_Water\\_Bill\\_2015.pdf?1438843517](https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/2170/attachments/original/1438843517/EDOs_of_Australia_Submission_Water_Bill_2015.pdf?1438843517)

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