



Australian Government
**Department of Agriculture
and Water Resources**

SECRETARY

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Dear Ms Wynn

Thank you for the opportunity to provide comments on the Australian Law Reform Commission's Interim Report on Traditional Rights and Freedoms. The Department of Agriculture and Water Resources' submission is attached.

If the Commission wishes to discuss any of the issues raised in the submission, please do not hesitate to contact Tara Oliver, Director of the Water Regulation Section, on (02) 6272 4674 or at tara.oliver@agriculture.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Daryl Quinlivan', with a long horizontal flourish extending to the right.

Daryl Quinlivan

21 October 2015

AUSTRALIAN LAW REFORM COMMISSION INTERIM REPORT ON TRADITIONAL RIGHTS AND FREEDOMS

SUBMISSION BY THE DEPARTMENT OF AGRICULTURE AND WATER RESOURCES

The Department of Agriculture and Water Resources welcomes the opportunity to make a submission in response to the Australian Law Reform Commission's Interim Report on Traditional Rights and Freedoms. This submission provides background information on the *Water Act 2007* (the Water Act) and the Murray-Darling Basin Plan 2012 (the Basin Plan).

Water rights in Australia and history of reform

Historically, water has not been owned in the same way in which real and personal property is owned; rather water was regarded as a public asset or public property, common to all who have a right to access it – access to water resources was an incident of land ownership. At common law, the owner or proprietor of land abutting on water was entitled to certain rights in relation to the water.¹ The common law position has been affected by legislation in all states which, commencing in the late 19th century, vested a right to take, use, manage and control water resources in the Crown.²

State legislation generally provides for the state to grant rights to persons to use water in its jurisdiction. Different categories of licence exist, including regulated and unregulated river access licences, aquifer licences and water utility licences as well as different levels of reliability such as high security and general security.

Traditionally, water resource management in Australia has been marked by tension between governments and competition between different interests and users, particularly in relation to the management of Australia's biggest river system - the Murray-Darling Basin. At the same time, there has been a long history of intergovernmental cooperation in the management of its water, commencing from 1915³ and reflected in current cooperative arrangements including in relation to the operation of the River Murray under the Murray-Darling Basin Agreement (schedule 1 to the Water Act), and the intergovernmental agreement aimed at implementing the integrated Basin-wide management framework embodied in the Basin Plan, made by the Commonwealth in 2012 under the Water Act.

The Water Act and Basin Plan framework

The Water Act built on and was informed by key aspects of the 2004 National Water Initiative (NWI)⁴ and the Australian Government's 2007 National Plan for Water Security.

Under the NWI, all jurisdictions agreed to establish clear and nationally-compatible characteristics for secure water access entitlements and provide for water markets to facilitate the trade of water access rights. Under the NWI, all water access entitlements

¹ Australian Government Solicitor Legal Briefing, 2009, *Swimming in New Waters: Recent Reforms to Australian Water Law*

² For example s 7 *Water Act 1989* (Vic); s 392 *Water Management Act 2000* (NSW).

³ The River Murray Commission was first established in 1915, with a focus on sharing the River Murray's waters between Victoria, New South Wales and South Australia.

⁴ Intergovernmental Agreement on a National Water Initiative between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory.

should represent a share of the 'consumptive pool' of a water resource and are exclusive, mortgageable, enforceable and tradeable. In this way, the NWI principles were intended to increase the security of access to water resources by water users through the establishment of clearly defined and tradeable statutory rights in water entitlements and the National Water Commission found that regulatory certainty had been enhanced under the NWI reforms.⁵

The Commonwealth Water Act puts in place a framework that ensures continuity in Basin States' existing roles and responsibilities in Basin water management. Water entitlements will continue to be defined and managed under Basin State laws. The Basin Plan will take effect through state water resource plans. State water agencies will continue to manage storages, river flows and water deliveries.

The Basin Plan, which was made in November 2012, provides for sustainable diversion limits (SDLs) to come into effect on 1 July 2019.⁶ SDLs limit the extraction of water resources in the Basin. Until 1 July 2019 State water resource plans which pre-date the Water Act determine how much water can be extracted.⁷ Under the Water Act SDLs are implemented by state water resource plans made pursuant to state legislation and subsequently accredited under the Water Act.

The SDLs for surface water specified in the Basin Plan are 2,750 gigalitres (GL) less than the Authority's estimate of the baseline diversions ('the gap').⁸ As at 31 August 2015, 1,956 GL of water in long term average annual yield terms had been secured towards meeting the 2,750 gigalitre 'gap' to the Basin Plan SDLs.

Claims that the Basin Plan could lead to water rights being eroded without compensation are incorrect

As noted by the Commission, the Water Act does not allow compulsory acquisition of water access rights (s 255). A number of other key features of the Act enhance the value of water access rights, for example through the Basin water charging and market rules made under Part 4 of the Act, and ensure that water rights cannot be eroded without compensation.

The Commonwealth has a statutory obligation to manage the SDL reduction in the Basin Plan and is doing so by 'bridging the gap'

Successive Commonwealth governments have committed to 'bridging' the full SDL 'gap' by 1 July 2019, when SDLs will be implemented through Basin Plan compliant state water resource plans. The Water Act does not specify how the Commonwealth should manage the impact or what steps may be taken and to date this has been managed as a matter of policy.

⁵ The NWC found that regulatory certainty had been enhanced through NWI measures such as unbundling of water rights from land, establishment of statutory water resource plans and entitlements and water registers in all Basin States (National Water Commission, 2011, Strengthening Australia's Water Markets)

⁶ S 6.04(1) Basin Plan 2012.

⁷ State water resource plans are recognised as transitional and interim water resource plans under Part 11 of the Water Act, and Part 11 of the Water Regulations 2008.

⁸ Note that the SDLs may be changed by up to 5 per cent as a result of the SDL adjustment mechanism. The mechanism allows for an increase in the SDL as a result of 'supply measures' which increase the quantity of water available before take while achieving equivalent environmental outcomes; and a decrease in the SDL as a result of 'efficiency measures', which make savings in the amount of water required before consumptive use.

The purpose of Commonwealth policy is to ensure there is no effect on the reliability and hence value of any water access entitlements and rights as the result of the Basin Plan. Water recovery programs are undertaken by agreement with willing partners who agree to undertake irrigation infrastructure improvements or to sell entitlements to the Commonwealth.

The Government's 2014 *Water Recovery Strategy for the Murray Darling Basin* sets out the Government's approach to bridging the gap, specifically that it would prioritise investment in water-saving irrigation infrastructure and limit market-based surface water purchases at 1,500 gigalitres. Legislation to enshrine the water purchase limit in the Water Act was passed by the Parliament in 2015.⁹ Since 2007-08, the Government has committed almost \$13 billion to support the implementation of the Basin Plan, with the vast majority of this investment (around \$8 billion) directed at infrastructure and efficiency projects.

As the Commonwealth is 'bridging' the gap, there should be no effect on the value or reliability of water entitlements. All water entitlements recovered under Commonwealth-run programmes are acquired for value as the result of individual irrigators or individual irrigation infrastructure operators choosing to participate in Commonwealth programmes.

Furthermore, the Water Act sets out the Commonwealth's responsibility in relation to risks attributable to the Commonwealth that arise from reductions in the long-term SDLs in the Basin Plan and any potential changes to reliability arising from implementation of other aspects of the Basin Plan.¹⁰ The Basin Plan then assigns 100 per cent of the risk relating to the SDL reduction to the Commonwealth and specifies that nothing in the Basin Plan affects reliability.¹¹

Basin Plan: reasonable excuse provisions

If the Commonwealth does not 'bridge the gap', there are additional protective provisions in the Basin Plan. The Basin Plan provides that if a Basin State does not comply with the SDL as a result of circumstances beyond its control then the Basin State has a 'reasonable excuse' for non-compliance with the Basin Plan SDLs. This means that all the water recovery risk associated with meeting the SDLs sits with the Commonwealth, and if the Commonwealth fails to 'bridge the gap' in a SDL resource unit then this will not adversely affect the rights of water entitlement holders in that resource unit.

The Water Act provides for market based compensation in the event of any reduction in the value of water access entitlements

The Water Act's risk framework also provides an important backstop to the bridging the gap commitment and reasonable excuse provisions by providing that the Commonwealth will make payments to any qualifying water access entitlement holder.¹² Payments are to be determined on the basis of reduction in the market value attributable to the Commonwealth's share of the reduction.

⁹ The *Water Amendment Act 2015* passed the Senate on 14 September 2015.

¹⁰ See Division 4 of Part 2 of the Water Act.

¹¹ Ss 6.13(6) and 6.14.

¹² Section 77, Water Act

The Water Act provides for just terms compensation for any acquisition of property

Section 254 of the Water Act provides for just terms compensation if the Act would result in an acquisition of property contrary to the just terms guarantee in s 51(xxxi) of the Constitution. However, it is important to note the finding the Federal Court in *Lee v Commonwealth* that the Water Act did not result in an acquisition of property otherwise than on just terms.¹³

The Basin-wide market, pricing and trading rules enhance the security and value of entitlements

The Water Act and Basin Plan provide a framework to support market activity by providing for a consistent approach to water pricing and cost recovery and by establishing a regulatory framework¹⁴ that enables water users to participate in the water market, including across state boundaries, without unreasonable restriction. Market rules allow for transformation of contractual rights to statutory entitlements. These arrangements help to enhance the security and value of entitlements.

Constraints Management Strategy

Constraints are rules and structures that influence the volume and timing of regulated water delivery. Constraints may include physical structures (for example, low lying bridges), river management practices and river operational limits. In 2012 Basin governments requested that provision for a Constraints Management Strategy (CMS) be included in the Basin Plan. The strategy, which identifies key constraints issues, options and risks in some detail, was finalised by the Murray-Darling Basin Authority in 2013. The CMS is being used to inform Basin State governments in the development of their proposals to remove or ease constraints.

Concerns about the CMS, specifically whether and how private land could be deliberately flooded as a result of water released by the Commonwealth Environmental Water Holder (CEWH) represent a misunderstanding of how the CMS framework will be implemented.

Any decisions to remove or relax constraints will be made by mutual agreement of all Basin governments by 30 June 2016 in accordance with the process set out in the 2013 *Intergovernmental Agreement on Implementing Water Reform in the Murray-Darling Basin*. Agreed constraints projects are intended to be operational by 2024.

More broadly, the CEWH has said that it has not and will not place water orders that would result in flooding of private land without the consent of the landowner and in any case the CEWH can only place orders. Decisions on the volume of water released from storages are made by the state government agency responsible for managing that storage.

In any event, the CEWH has committed to being a 'good neighbour' in relation to its management of environmental water. In particular, if there are potentially unacceptable

¹³ *Lee v Commonwealth of Australia* [2014] FCA 432, paras 192-221; *Lee v Commonwealth of Australia* [2014] 315 427 at 456- 459; on 29 November 2014 the High Court refused to grant special leave.

¹⁴ Including the water charge rules and market rules made under Part 4 of the Water Act and the trading rules in Chapter 12 of the Basin Plan.

impacts on private property it will negotiate with affected landholders to avoid or minimise any potential problems.

Conclusion

The Water Act has had the effect of enhancing the security and value of statutory water entitlements in the Murray-Darling Basin as established under state and territory law.

An independent review of the Water Act was undertaken in 2014 and the Australian Government's response will be released in due course. This review included significant consultation, including a public submission process and roundtable discussions with more than 50 stakeholder groups and all states and territories, and included recommendations for reviews of the Water Act and Basin Plan.

The Basin Plan is currently being implemented in anticipation of the SDLs taking effect in 2019. During this time it is vital for the Murray-Darling Basin's communities and industries that there is certainty as to the function and effects of the Water Act and Basin Plan.

FURTHER INFORMATION

Australian Government, *Water Recovery Strategy for the Murray-Darling Basin*,
<http://environment.gov.au/water/publications/water-recovery-strategy-murray-darling-basin>

Report of the Independent Review of the Water Act 2007,
<http://www.environment.gov.au/water/legislation/water-act-review>

Murray-Darling Basin Authority, *Constraints Management Strategy*
<http://www.mdba.gov.au/media-pubs/publications/constraints-management-strategy>

Council of Australian Governments, 2004, *Intergovernmental Agreement on a National Water Initiative*, <http://www.nwc.gov.au/nwi>

Murray-Darling Basin Ministerial Council, *The Sustainable Diversion Limit Adjustment Mechanism*, Joint Government Booklet, November 2014,
<http://www.environment.gov.au/system/files/pages/5605abde-8f32-407b-aa7b-a4af812bf821/files/sustainable-diversion-limit-adjustment-mechanism.pdf>