



australian network of environmental defender's offices

Submission to the Senate Rural and Regional Affairs and Transport Committee Inquiry into the *Water Amendment Bill 2008* **November 2008**

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

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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Submitted to:

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Executive Summary

The Australian Network of Environmental Defender's Offices Inc (ANEDO) is a network of 9 community legal centres in each state and territory, specialising in public interest environmental law and policy. ANEDO welcomes the opportunity to provide comment to the Senate Rural and Regional Affairs and Transport Committee Inquiry into the *Water Amendment Bill 2008*. We have previously provided comment on the *Water Act 2007* and retain a keen interest in the development of water law across Australia.¹

The Murray Darling Basin ('Basin') covers one-seventh of Australia, supports an agricultural industry worth more than \$9 billion per annum, and contains 16 internationally recognised wetlands². As a result, any legislation purporting to apply to the Basin must be subject to close scrutiny and must involve all stakeholders. The *Water Amendment Bill 2008* makes changes in relation to the administration and governance of the Murray-Darling Basin, and the details to be contained in the Basin Plan, which when drafted will constitute one of the most important environmental instruments ever developed in Australia. ANEDO is therefore concerned with the short timeframe provided for public comment on the bill.

This submission makes comment on the following areas:

1. Ministerial Council
2. The Basin Plan – Critical Human Needs
3. Indigenous Participation
4. Risk Assignment Framework
5. Water Pricing and Market Rules
6. Key recommendations from ANEDO submission on the *Water Act 2007*

Our key recommendations and comments are as follows:

- ? ANEDO supports the provisions clarifying that the Ministerial Council will be advisory only, with no determinative powers in relation to the Basin Plan;
- ? ANEDO submits that the bill should be amended to provide clear and objective criteria that must be taken into account by the MBDA in determining Critical Human Water Needs;
- ? For those areas identified as areas likely to suffer long-term shortages in water availability, we submit that structural adjustment packages should be considered as a means of assisting these communities in transitioning to a low-water future.
- ? The bill should provide increased opportunity for effective Indigenous engagement and representation when developing strategies regarding the governance of the Murray Darling Basin;

¹ See ANEDO submission to the *Water Bill 2007*. Found at http://www.edo.org.au/policy/water_bill070824.pdf

² *Agreement on Murray-Darling Basin Reform*, 3 July 2008.

- ? The risk assignment framework regarding compensation for changes in 'policy' and 'improved knowledge' should be clarified to remove ambiguity;
- ? There are strong legal and policy reasons why compensation should not be provided for the reduction of water entitlements stemming from public policy and environmental considerations; and
- ? The ACCC should take into account environmental externalities when advising the Minister on the price of water.

1. Ministerial Council

The *Water Amendment Bill 2008* ('the bill') gives effect to the new *Intergovernmental Agreement on Murray-Darling Basin Reform* (IGA) which, among other functions, establishes the Ministerial Council ('the Council'). The detail relating to the establishment and duties of this body is contained in the revised IGA. It provides that the Council is to, *inter alia*, have an "advisory role in relation to the Basin Plan", and "consider and determine outcomes and objectives on major policy issues that are not addressed in the Basin Plan, for the management of the Basin's water and natural resources"³. These provisions are indicative of the strong role to be played by the Council in regard to both matters relevant to the development of the Basin Plan, as well as the general "management of the Basin's water and natural resources."

In our submission on the *Water Bill 2007*, we highlighted that having an independent expert authority would be critical to the development, implementation and enforcement of the strategic planning regime introduced by the bill. We also pointed out that such an authority "should be free to the greatest extent possible from Ministerial intervention"⁴. ANEDO therefore supports the provisions in the bill clarifying that the Council will be advisory only, with no determinative powers.

2. The Basin Plan – Critical Human Needs

ANEDO welcomes the inclusion of a definition for Critical Human Water Needs (CHWN), a concept introduced into the initial *Water Act 2007*. The bill provides that,

"Critical human water needs are the needs for the minimum amount of water, that can only reasonably be provided from Basin water resources, required to meet:

- (a) core human consumption requirements in urban and rural areas; and*
- (b) those non-human consumption requirements that a failure to meet would cause prohibitively high social, economic or national security costs."*⁵

Whilst ANEDO welcomes the clarification of the concept, the bill has created new uncertainties, particularly with regard to the allocation of water for "non-human consumption requirements". This category requires water to be provided to those activities that, if left with an inadequate water supply, would cause "prohibitively high social, economic or national security costs". This is both a subjective and quite vague formulation. ANEDO submits that the bill should be amended to provide clear and objective criteria that must be taken into account by the MBDA in determining what is a "Critical Human Water Need".

We believe that scientific data must be a mandatory consideration in determining Critical Human Water Needs. The recent studies conducted by the CSIRO concerning sustainable yield modelling of the MDB provide an example of the type of information that should be incorporated into the decision making process.⁶ This information can

³ *Agreement on Murray-Darling Basin Reform*, 3 July 2008.

⁴ ANEDO Submission on the *Water Bill 2007*. Available at: <http://www.edo.org.au/edonsw/site/policy.php#3>.

⁵ *Water Act Amendment Bill 2008* Sec 86A (2).

⁶ See <http://www.csiro.au/partnerships/MDBSY.html> (3 November 2008).

inform decision makers as to whether the current level of inflows and water availability will persist in the future in a particular area. This will assist in determining whether a particular industry will have long term access to water and whether the industry is viable in the long term.

For those areas identified as areas likely to suffer long-term shortages in water availability, we submit that structural adjustment packages should be considered as a means of assisting these communities in transitioning to a low-water future. Such schemes are an acknowledgement that certain areas will suffer economic and social hardship in the near future. Governments in the 1990s introduced structural adjustment packages in several industries such as the fishing and timber industries. These were successful at addressing the hardships suffered by people in those industries as a result of restrictions on their exploitation of these resources. Some of the tools used were grants for restorative works, tax rate relief, and assistance in transitioning to other industries.⁷ ANEDO recommends that decision makers consider the long term viability of various industries in the MDB rather than focus on short-term economic and social needs.

It is important to note that the Bill raises the concept of “trigger points” where an “emergency response”⁸ will be required to address situations where water quality becomes too poor, or water salinity too high to meet CHWN. Whilst allocating water to those communities or landholders heavily reliant on areas such as agriculture in times of severe dryness, may stave off economic, and therefore social downturn in the short term, such actions may simultaneously deplete natural systems of water, which in turn is likely to increase the prevalence of areas succumbing to the “trigger points” highlighted in the bill. Therefore, it is important that decision makers ensure environmental consequences are taken into account before water is allocated to reduce the likelihood of “trigger points” being reached and subsequent “emergency responses” needing to be introduced.

3. Indigenous Participation

As the Act currently stands, there is limited opportunity for Indigenous people to access resources, engage with decision makers and influence how the MDB is to be governed. ANEDO has two main concerns relating to indigenous participation. *First*, the absence of Indigenous needs in the newly defined “Critical Human Water Needs”. *Second*, the lack of opportunity for effective Indigenous engagement and representation on the various boards and committees.

Critical Human Water Needs

We note that there is no mention of Indigenous considerations in the definition for “critical human water needs”. ANEDO suggests that the concept of CHWN should encompass “cultural flows” as a critical human need. This has been described as:

“water entitlements that are legally and beneficially owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations.”⁹

⁷ Environmental Defender’s Office, (2003) *Submission on Water Rights in Response to the Draft Report of the CEOs Group on Water of the Natural Resource Management Ministerial Council*. Available upon request from robert.ghanem@edo.org.au.

⁸ Section 86F, *Water Act Amendment Bill 2008*.

⁹ Murray Lower Darling Rivers Indigenous Nations (MLDRIN) 2008 - *Cultural Water Brief*.

This would be consistent with international agreements such as the *Declaration of Rights for Indigenous Peoples* (which Australia is reported to be signing in the near future) that refer to Indigenous peoples rights to access “resources”, which includes water as a clear cultural need.

Indigenous participation

There is little opportunity for both effective Indigenous engagement and representation, in regard to the development of both the Basin Plan and general governance of the MDBA. The bodies formed to develop strategies for the governance of the MDB include the MDBA, the newly formed Ministerial Council, the Basin Officials Committee, and the Basin Community Committee. None of these committees require Indigenous representation. The only body that alludes to the representation of Indigenous concerns is the Basin Community Committee. The Act provides that to be eligible for appointment to this Committee,

“an individual must have a high level of expertise or interest in :

- a) community, indigenous or local government matters relevant to the Basin water resources; or*
- b) irrigated agriculture; or*
- c) environmental water management.”¹⁰*

Whilst it must be recognised that this acknowledgement of Indigenous participation is a positive step, the current process provides insufficient opportunity for Indigenous representation on the Basin Community Committee as it does not ensure there is an Indigenous representative. This should be amended to include a mandatory Indigenous member.

The bill should also be amended to provide for the compulsory representation by an Indigenous individual on the MDBA based on their skills and experience.

Finally, the definition of “water user” should also be amended to include a person engaged in water for Indigenous cultural purposes.

4. Risk assignment framework

ANEDO understands that the changes made to the risk assignment framework, whereby the Commonwealth will take full responsibility for compensation when the sustainable diversion limit is reduced due to improved knowledge, is a key element of the Intergovernmental agreement of 3 July 2008. However, we have some key concerns relating to the practical application of the framework.

Under the framework, compensation is payable to water access licence holders in certain circumstances. Holders are not entitled to compensation for natural reductions in water availability that is caused by climate change and ‘periodic natural events such as bushfires or droughts’.¹¹ Licence holders also bear the risk of reductions stemming from improvements in scientific knowledge until 2014. However, the risk of reductions due to changes in government policy is fully compensated for by the Commonwealth

¹⁰ Section 204(3), *Water Act 2007*.

¹¹ Clause 48, Intergovernmental Agreement, *National Water Initiative*.

Government. After 2014 reductions due to increased knowledge will only be borne by licence holders for the first 3 per cent of reductions.¹² Above this figure, the loss will be borne by the Commonwealth Government. The Bill ensures that the states will no longer be liable to pay compensation for reductions stemming from improvements in knowledge.

Whilst we understand that the establishment of the risk assignment framework was a key element of the *National Water Initiative*, we believe that certain aspects of the framework need clarification to ensure its workability, especially since the framework is yet untested. We submit that the difference between “policy”, and “improved knowledge” should be clarified. At present, the distinction between ‘government policy’ and ‘improved knowledge’ is unclear. Changes in government policy are often based on improved knowledge about the sustainable extraction limits of particular catchments provided by CSIRO or other scientific and expert bodies. For example, in a situation where the Commonwealth Government changes its policies as a result of such new information, and as a consequence reduces the sustainable diversion limit, it would be difficult to determine which compensation provisions would apply.

Furthermore, ANEDO has previously been critical of the framework as it provides little scope for uncompensated reductions to farmers’ water entitlements.¹³ That is, if water allocations have to be reduced by the Commonwealth for any reason, a right to compensation is enlivened. This stifles the environmental objectives of the *National Water Initiative* as the Commonwealth will be reluctant to reduce allocations (for example in response to new knowledge and climate change projections) for fear of the financial ramifications.¹⁴

ANEDO reiterates that changes in government policy (whether as a result of improved knowledge or otherwise) should not be compensable. As noted previously, it is contrary to established legal doctrine to provide compensation for regulation (as opposed to acquisition).¹⁵ Moreover, there are also strong policy reasons in favour of such an approach.¹⁶ Therefore, the reduction of water entitlements stemming from public policy and environmental considerations should not activate a right to compensation.

5. Water pricing and Market Rules

ANEDO supports a uniform pricing and market rule approach across the MDB administered by the ACCC. We believe it is imperative that water charge and market rules apply to all entities that charge regulated water prices, not just to constitutional corporations. Consistent pricing across the MDB will avoid perverse outcomes due to variable pricing and will encourage economically efficient and environmentally sustainable water use.¹⁷ Furthermore, it will prevent irrigation infrastructure operations from inhibiting trade.

¹² Section 87AA(6), *Water Management Act 2000*.

¹³ Andrew Macintosh and Richard Denniss, ‘Property Rights and the Environment: should farmers have a right to compensation?’ (2004)- The Australia Institute at vii.

¹⁴ *Ibid*.

¹⁵ Environmental Defender’s Office (2003), *Submission on Water Rights in Response to the Draft Report of the CEOs Group on Water of the Natural Resource Management Ministerial Council*. Available upon request from robert.ghanem@edo.org.au.

¹⁶ *Ibid*.

¹⁷ CSIRO (2001), *Pricing Water – a Tool for Natural Resource Management in the Onkaparinga Catchment*. Found at: <http://www.clw.csiro.au/publications/consultancy/2001/Onk2WaterPricing.pdf> (28 October 2008).

However, it is important that water is in fact adequately priced to reflect environmental, economic and social costs. That is, the price of water must include the unquantified environmental costs of water use that are not currently factored into pricing considerations. These “costs” include changes in habitat, water quality and ecological conditions, and increased salinity.¹⁸ Water is not an unlimited resource. Therefore users should pay a price for water that reflects its scarcity. If environmental (and indeed social) externalities are not reflected in the price of water, then more water is used than would otherwise be the case if these costs were internalised. Proper pricing of water will reduce the use of water resources and will stimulate water efficiency measures at lowest cost.

However, we note that it is important that a reasonable amount of water should remain accessible to lower socio-economic groups at a price that is affordable. The Minister should take this into account in determining water pricing in disadvantaged areas.

ANEDO also supports the provision allowing the states to extend the operation of the water charge rules and/or water market rules to areas of the state outside the Basin on an ‘opt-in’ basis. A coordinated national approach, not limited by catchment boundaries, will ensure that water is used in an economically efficient and ecologically sustainable manner across Australia. An opt-in provision would go some way to achieving this.

We also support the rationalisation of water market rules across the Basin to facilitate a uniform and efficiently functioning water market. If the water trading market is not underpinned by robust principles, then the environmental and economic benefits of water trading will not be realised. The coordination of market rules by the ACCC through guidelines that implement such principles will assist in removing barriers for trade, and will also provide for consistency and transparency in market mechanisms.

6. Key recommendations from previous ANEDO submission

We note that none of our previous concerns that we highlighted in our submission to the *Water Act 2007* have been addressed.¹⁹ We therefore reiterate our key recommendations. We submit that:

- ? the independence of the MDBA must be retained;
- ? the lack of coordination between the Basin Plan and investment under the National Plan for Water Security should be addressed;
- ? the integration with the *Environment Protection and Biodiversity Act 1999* should be improved;
- ? Australia’s international commitments should not only be implemented, but given effect in the new legislation;
- ? the restrictions on the Commonwealth Environmental Water Holder should be removed; and
- ? accountability should be improved through the inclusion of public standing provisions.

¹⁸ K Hussey & S. Dovers (eds.) *Managing water for Australia- the social and institutional challenge* CSIRO Publishing at 78.a

¹⁹ See ANEDO submission to the *Water Bill 2007*. Found at http://www.edo.org.au/policy/water_bill070824.pdf