



## Environmental Defender's Office ACT Inc.



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Water Policy  
Environment and Sustainable Development Directorate  
GPO Box 158  
Canberra ACT 2601

By email: [water.policy@act.gov.au](mailto:water.policy@act.gov.au)

Dear Sir/Madam

***Re: Draft ACT Water Strategy 2013, Public Consultation***

I am pleased to provide the attached submission to the public consultation on the *Draft ACT Water Strategy 2013*.

The Environmental Defenders Office (ACT) Inc would welcome the opportunity to discuss our submission further should you consider that we can assist in clarifying any of the issues raised in our submission.

Yours sincerely

**Environmental Defender's Office (ACT) Inc**

**Camilla Taylor**

Executive Director and Principal Solicitor



## **Draft ACT Water Strategy, Public Consultation August 2013** **Submission<sup>1</sup>**

### **1. Executive Summary:**

The Environmental Defender's Office (ACT) Inc ('EDO') is a community legal centre specialising in public interest environmental law. We provide legal representation and advice, take an active role in environmental law reform and policy formation, and offer educational publications and programs designed to facilitate public participation in environmental decision-making.

The ACT framework should be consistent with the goals of the *Intergovernmental Agreement* committed to under the National Water Initiative (NWI) and the *Water Act 2007* (Cth) so as to promote the objectives of the *Strategy 2013*. The following key recommendations are made in this submission:

- Reform of the *Water Resources Act 2007* (ACT) is needed to ensure that the water management system will maintain and restore ecosystems and river health into the future. This report makes a number of recommendations for changes to the legal framework for water management in the ACT to help ensure that the ACT will restore as well as maintain the health of the aquatic ecosystems. Amendments to the *Water Resources Act 2007* will ensure that Act reflects the objectives of the NWI, as well as those in the *Water Act 2007* (Cth), and the *Strategy 2013* itself.
- 'Environmental water' must be introduced into the enabling legislation and the *Water Resources Act 2007* should provide greater transparency regarding the management of water in the ACT. The Murray Darling Basin Plan requires accounting for 'environmental water' within the water framework and key NWI commitments give statutory recognition to '*environmental water*', security to water access entitlements as well as fully accounting for their measurement, monitoring and reporting and making these reports publicly available.

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<sup>1</sup> This submission has been prepared by the Executive Director and Principal Solicitor at the EDO (ACT) Inc, Ms Camilla Taylor, assisted by volunteers, Ms Clara Wilson and Ms Lea Weekes-Randall. The authors are grateful for the review comments provided on earlier versions of this submission by Emeritus Professor Ian Falconer and the EDO (ACT) Chair, Hanna Jaireth.

- Environmental flows are crucial to encourage resilience over the longer term. In practice, the ecological needs of aquatic ecosystems must be considered in priority to consumptive use as to do otherwise runs counter to the NWI and the Commonwealth's *Water Act 2007*. Monitoring and assessment framework must not only seek to ensure environmental outcomes, but account for whether environmental flow is delivered. The existing methodology used should be revised to give this consideration greater weight.
- The implementation of a legal mechanism to require a minimum amount of flow for the environment ought to be established and made enforceable. This requirement will ensure the health of the aquatic system, including groundwater and surrounding water dependant ecosystems as well as maintaining quality of water for environmental and consumptive objectives as well as social, economic, and public health outcomes.
- The ACT must identify the key science priorities to support implementation of the NWI and to implement co-ordinated scientific based research in key areas to ensure any gaps are addressed. This submission recommends key areas such as groundwater; best practice in water planning management; a water management system that prioritises environmental flows based on ecologically sustainable development and science based criteria; and ensuring environmental flows create resilient ecosystems in light of climate change.
- Details of water allocation are publicly available, however it is not readily accessible, making it difficult for stakeholders to accurately identify what water is allocated for the environment. A lack of monitoring discourages accountability. The EDO recommends that the ACT Government's water management system prioritises environmental flows, and incorporates these measures into the terms and conditions of each water allocation.
- The ACT Government should action the finding in the *State of Environment Report 2011* to invest in additional scientific research into the connectivity between surface and ground water systems.
- The ACT water management and planning framework should be more transparent around decision making processes provided by the *Water Resources Act* to the Minister and the Environmental Protection Authority. Further public consultation is necessary where major projects may have a significant impact on the aquatic ecosystem and water dependant ecosystems. Licencing conditions should be made mandatory so that a greater transparency and accountability is achieved.
- The metered extraction of water in the ACT should be routinely monitored, the extraction reported and audited, and prosecuted in circumstances of a breach. When monitoring and enforcement is inadequate it can create disincentives to comply with the legislation, and detract from longer term sustainable water management.

- Clear requirements are needed within the *Environmental Flow Guidelines 2013* Monitoring and Assessment Program requiring compliance with terms and conditions of water usage, including their incorporation into the *Water Resources Act*, with penalties for non-compliance.
- The Water Accounting Conceptual Framework (WACF) should be adopted and implemented within the water accounting regime, so as to adhere to the commitments made pursuant to the *Intergovernmental Agreement of a National Water Initiative (2004)* and to achieve harmony amongst States in their water management regimes.
- Water planning in the ACT appears to lack a robust monitoring and reporting program which undermines an effective regulatory framework. The EDO recommends the provision of accurate and timely information to all relevant stakeholders in relation to water plan implementation and the security of water access entitlements.
- A recommendation that the ACT comply with the NWI commitment to establish an environmental water manager with the necessary resources and authority to manage environmental water effectively.
- Water planning in the ACT should include consultation with all stakeholders including Indigenous groups. The ACT Government must explicitly account for Indigenous water values and requirements in water planning and build the capacity of Indigenous leaders to participate in water planning and management. Such consultation ought to be made a statutory requirement in the *Water Resources Act 2007*.
- A recommendation that cultural flows for Indigenous people ought to be provided including Indigenous peoples' rights to access resources which includes water as a cultural need.
- A recommendation that the ACT Government adhere to its commitment to the NWI and its vision in the *Strategy 2013* by ensuring adequate and secure environmental flows through water management plans are based on the best scientific information.
- A recommendation that the ACT Government incorporate climate change projections into decision-making.
- A recommendation that the ACT position itself as a national leader in adaptive management modeling and invest in additional scientific research so that the water management system is based on the best available ecological science.
- Water allocation pursuant to the *Water Resources Act* must be flexible in light of the adaptive management proposed in the *Strategy 2013*. The EDO also recommends that water allocations incorporate adaptive management terms, with the Act amended to address the risk arising from future changes in the availability of water for consumption.

## 2. Introduction:

This submission comments on the *Draft ACT Water Strategy 2013* ('the *Strategy 2013*') which takes a long-term view of water resource planning in the ACT, considering all water sources and the needs of urban areas, the environment, industry and commercial development and gives guidance for the development, integration and implementation of management plans prepared by water service providers and agencies involved in activities and works in the catchment, as well as planning and development agencies operating within the ACT and region. The *Strategy 2013* builds on the achievements of the *Think water, act water* initiative released in 2004.<sup>2</sup> This submission does not constitute legal advice. As a public interest law centre the EDO strongly supports the implementation of efficient and effective environmental laws in the ACT for the benefit and wellbeing of the ACT community. The *ACT State of the Environment Report* (2011) assesses all aspects of the environment including atmosphere, biodiversity, land, water and human settlements.<sup>3</sup> The 2011 Report found that there were several issues with land and water health in the ACT, including high levels of nutrients leading to blue-green algae in lakes and ponds,<sup>4</sup> and water quality being negatively impacted by urban development.<sup>5</sup> The Report also noted the continuing challenges to land and water health from land clearing and urbanisation, climate change, population growth, and cross-boundary catchment management.<sup>6</sup> It is crucial that these issues are prioritised in the implementation of the *Strategy 2013* and that the policies and outcomes identified in the *Strategy 2013* are incorporated into the ACT water planning and management framework by way of legislative amendments. Accordingly, in this submission the EDO refers many times to the legislation responsible for water management and planning in the ACT, the *Water Resources Act 2007* ACT ('the WRA'), to assess whether the WRA already contributes to the implementation of the *Strategy 2013*. This exercise was not exhaustive, however we identified several aspects of the WRA which require amendment in order to achieve the vision and long-term strategies described in the *Strategy 2013*.<sup>7</sup>

## 3. Amendments to the *Water Resources Act 2007* (ACT):

This part of our submission makes a number of recommendations for changes to the legal framework for better water management in the ACT. Firstly, the ACT framework should be

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<sup>2</sup> *Water for the future- striking the balance: Draft ACT Water Strategy 2013*

<[www.environment.act.gov.au/water/act\\_water\\_strategy/draft\\_act\\_water\\_strategy\\_2013](http://www.environment.act.gov.au/water/act_water_strategy/draft_act_water_strategy_2013)>.

<sup>3</sup> Office of the Commissioner for Sustainability and the Environment, 'Executive Summary', *ACT State of the Environment Report* (2011) 1.

<sup>4</sup> Office of the Commissioner for Sustainability and the Environment, 'Land and Water Theme Paper', *ACT State of the Environment Report* (2011) 4.

<sup>5</sup> *Ibid* 2.

<sup>6</sup> *Ibid* 6.

<sup>7</sup> *Draft ACT Water Strategy 2013, above n 2, 'Executive Summary', 1.*

consistent with the goals of the *Intergovernmental Agreement* committed to under the NWI,<sup>8</sup> and should assist the Environmental Protection Authority (EPA) in its functions.<sup>9</sup> Reform of the WRA is needed to ensure that the ACT will **restore** as well as **maintain** the health of the aquatic ecosystems,<sup>10</sup> as well as adhere to its current objects ‘to protect aquatic ecosystems and aquifers from damage and, where practicable, to reverse damage that has already happened’.<sup>11</sup>

### 3.1 Objects (s 6):

The objects of the WRA should be amended to reflect the objectives of the NWI, as well as those in the *Water Act 2007* (Cth), and the *Strategy 2013* itself. Section 6(a) should be maintained, as it acknowledges the need for ‘effective water planning’, and is in harmony with Theme 1 of the Strategy.<sup>12</sup> The principle of intergenerational equity outlined in s 6(c) should also be maintained. However, s 6(b) only commits to reversing damage to aquatic ecosystems and aquifers ‘where practicable’. This section should be amended to include the ‘resolution of over allocation and overuse’,<sup>13</sup> as provided in the NWI objectives. We note it has been reported that there is no over allocation in the ACT,<sup>14</sup> however we believe the latter mentioned amendment ought to be incorporated as a reminder as well as a safeguard.

The objects of the WRA should also be amended to include the principles of ecologically sustainable development, which are provided for in the objectives of the *Water Management Act 2000* (NSW),<sup>15</sup> and the *Water Act 2007* (Cth).<sup>16</sup>

It is a matter of concern that the objects of the WRA do not directly refer to the need for ‘effective water accounting’,<sup>17</sup> ‘open water markets’,<sup>18</sup> and monitoring and assessment. The water access entitlements and licensing provisions of the WRA function to create water rights, and thus trade in water rights. These principles should be acknowledged in the objects of the WRA.

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<sup>8</sup>*Intergovernmental Agreement of a National Water Initiative (2004)* between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory.

<sup>9</sup>*Water Resources Act 2007* (ACT) (‘WRA’) s 64(1).

<sup>10</sup>WRA s 12.

<sup>11</sup>WRA s 6(b).

<sup>12</sup>The outcome of Theme 1 is a ‘well-managed, functioning aquatic ecosystems that protect ecological values and contribute to the liveability of the ACT community’, 11.

<sup>13</sup>National Water Commission, *NWI Objectives*, Department of Sustainability, Environment, Water, Populations and Communities, <[nwc.gov.au/nwi/objectives](http://nwc.gov.au/nwi/objectives)>.

<sup>14</sup>National Water Commission, ‘The National Water Initiative- securing Australia’s water future: 2011 Assessment, Appendix B’, 2011, National Water Commission, <[www.nwc.gov.au/publications/topic/assessments/ba-2011](http://www.nwc.gov.au/publications/topic/assessments/ba-2011)>, 79(ii), 211.

<sup>15</sup>*Water Management Act 2000* (NSW) s 3(a).

<sup>16</sup>*Water Act 2007* (Cth) s 3(c).

<sup>17</sup>Ibid.

<sup>18</sup>Ibid.

The EDO further suggests that the objects should be amended to acknowledge adaptive management in light of climate change as well as to reflect the objects of the *Strategy 2013*.<sup>19</sup>

### 3.2 Amount of Available Water (s 17):

As the *Strategy 2013* acknowledges, a key development since the *Think Water Act Water* initiative has been the finalisation of the Murray Darling Basin Plan (MDBP).<sup>20</sup> Reference should be made to the ACT's commitments under the Plan in s 17(2), in matters that the Minister must take into account when preparing the *Environmental Flow Guidelines 2013*, as discussed further below.

### 3.3 Water Access Entitlements (Part 4):

Community consultation is evidently a priority for the *Strategy 2013*, as reflected in the vision of 'a community working together to manage water wisely to support a vibrant, sustainable and thriving region'.<sup>21</sup> Presently, the public has no input into whether an access entitlement is granted.<sup>22</sup> While community consultation could pose logistical difficulties if it was required for every entitlement granted, it is desirable for the public to have a say in the decision-making process for those entitlements which are likely to have a major impact on the water system in the ACT. It is problematic, for example, that information about water access entitlements and other allocations are not available online, despite the legislation providing for access.<sup>23</sup> At present, s 66 of the WRA provides that a Register for the WRA may be kept 'in any form'.<sup>24</sup> While the Register 'must be available for public inspection at reasonable times',<sup>25</sup> it is unrealistic for the community to inspect the Register within working hours at the EPA. The EDO recommends that all water allocations including entitlements should be available online, where they are more readily accessible.

### 3.4 Licences (Part 5):

In its report to the National Water Commission ('the Commission') for the *2011 Biennial Assessment*, the ACT reported no over-allocated water systems.<sup>26</sup> It is crucial that the ACT does not strain aquatic ecosystems (and potentially breach its national obligations) by any future over-allocation, and this safeguard ought to be formalised in the WRA.

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<sup>19</sup> In particular, the outcome of Theme 2: 'An integrated and efficient water supply system that...is adaptive to change...'

<sup>20</sup> *Murray Darling Basin Plan* (2012).

<sup>21</sup> *Draft ACT Water Strategy 2013*, above n 2, 1.

<sup>22</sup> WRA Part 4.

<sup>23</sup> National Water Commission, '2011 Assessment', above n 14, 211.

<sup>24</sup> WRA s 66(2).

<sup>25</sup> *Ibid* s 67(1).

<sup>26</sup> National Water Commission, '2011 Assessment', above n 14, 211.

Section 30 of the WRA provides a comprehensive list of factors the EPA must take into account when deciding whether to grant a licence to take water. Section 31 provides for conditions to be attached to the licence. It would greatly increase the transparency of water licences and the accountability of licence holders if these conditions were made mandatory for all water licences. The examples provided in the Act include keeping records,<sup>27</sup> installing and maintaining a water meter,<sup>28</sup> monitoring and testing water,<sup>29</sup> conditions about the rate<sup>30</sup> and places<sup>31</sup> from which water is taken, that information about compliance with licence conditions be given to the authority,<sup>32</sup> and that the authority be allowed to conduct regular routine inspections.<sup>33</sup> At the very least, records should be kept of water usage. These conditions should also be mandatory for licences under Divisions 5.3 (Bore work), 5.4 (Waterway work), and 5.5 (Recharge licences).

The EDO welcomes the *Water Resources Amendment Bill 2013 (ACT)*, which has amended these licence provisions,<sup>34</sup> and the offences under Part 9A.<sup>35</sup>

### 3.5 *Disciplinary Action (Part 6):*

There is little information publicly available about instances of breaches of licencing provisions or other provisions of the WRA. The EDO submits that accountability and therefore compliance would improve if such information was broadly accessible. The above proposed amendment for making conditions mandatory for water licences would further licence holders' accountability and ensure that breaches were met with the appropriate disciplinary action.

### 3.6 *Monitoring and Enforcement (Part 10):*

The EDO submits that restoration and maintenance of the aquatic ecosystem necessitates that the EPA be more active in its assessment of licences, its monitoring for breaches of licences and other aspects of the WRA, and enforcing these provisions.<sup>36</sup>

In a recent submission to the Natural Resources Commission regarding the review of Water Sharing Plans (WSP) in NSW, the NSW EDO observed that there were gaps in 'monitoring

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<sup>27</sup> WRA s 31 Example 1.

<sup>28</sup> Ibid s 31 Example 2.

<sup>29</sup> Ibid s 31 Example 4.

<sup>30</sup> Ibid s 31 Example 6.

<sup>31</sup> Ibid s 31 Example 5.

<sup>32</sup> Ibid s 31 Example 3.

<sup>33</sup> Ibid s 31 Example 9.

<sup>34</sup> *Water Resources Amendment Bill 2013 (ACT)*, s 32(2)(c).

<sup>35</sup> Ibid ss 77B, 77C, 77F.

<sup>36</sup> Environmental Defender's Office ACT, Submission to the Environment and Sustainable Development Directorate, *Environment Protection Act Review*, November 2012, 2. Noted in para [5] that in order for the EPA to achieve its objectives, its current office will need to be expanded, and its funding increased.



and data collection' in relation to water licences.<sup>37</sup> The EDO claimed that it was 'not possible to determine whether the individual licence holder has complied with their licencing conditions',<sup>38</sup> and advocated 'increased transparency' in terms of individual accounts data.<sup>39</sup> The same argument can be applied to the licencing system in the ACT.

If mandatory licence conditions requiring reporting to the EPA were introduced, the EPA would be able to more effectively and efficiently monitor compliance with the WRA. If these conditions are not attached to all water licences, the EPA must be more proactive in monitoring and data collection. The EDO acknowledges that such an amendment would put a strain on the existing resources of the EPA.

It is also apparent that there have been very few prosecutions under the WRA. The EDO notes the case of *O'Donnell v Environment Protection Authority* (2012) FLR 48, which involved an appeal from a decision of the Administrative Appeals Tribunal to uphold a decision of the EPA to request the defendant to cap an unlicensed bore under s 76. However, the majority of cases under the WRA are disputes between the Queanbeyan City Council and ACTEW over licence fees.

The lack of prosecutions under the Act raises doubts as to the efficacy of the EPA in its enforcement of the Act. Again, for the implementation of the *Strategy 2013* and its aims, the EPA needs to be more active in monitoring water use by licence holders, and in exercising the enforcement powers under Part 10 of the Act.<sup>40</sup>

#### **4. Environmental Water:**

The WRA does not include a definition of 'environmental water'. The only provision for a parallel concept is found in s 17(3),<sup>41</sup> however this is vague at best. The importance of environmental water is discussed below.

##### *4.1 Definition of 'environmental water':*

The ACT framework has no definition for 'environmental water'. The EDO strongly recommends the need for a definition of environmental water and recommends enabling legislation be enacted pursuant to the NWI action, namely that:

*'Water that is provided by the States and Territories to meet agreed environmental and other public outcomes as defined within relevant water plans (paragraphs 36-40 refer) is to:*

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<sup>37</sup> Environmental Defender's Office NSW, Submission to the Natural Resources Commission, *Water Sharing Plan Review*, February 2013, 12 <[www.edo.org.au/edonsw/site/pdf/subs/130211Review\\_WSPs\\_NSW.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/130211Review_WSPs_NSW.pdf)>

<sup>38</sup> Ibid 13.

<sup>39</sup> Ibid 14.

<sup>40</sup> EDO Submission, *Environment Protection Act Review*, above n 36, 2.

<sup>41</sup> WRA s 17(3) The Minister may also determine, for any water management area, an amount of the water determined under subs (1) that is to be reserved for future use.

- i. *be given statutory recognition and have at least the same degree of security as water access entitlements for consumptive use and be fully accounted for;...'.<sup>42</sup>*

The *Strategy 2013* acknowledges this national policy.<sup>43</sup> However a further step must be taken to formalise this important concept into the WRA. The *Water Act 2007* (Cth) defines 'environmental water' as either 'held environmental water' or 'planned environmental water'.<sup>44</sup> Held environmental water is defined as a right,<sup>45</sup> while planned environmental water is committed by plans or other legislative instruments for achieving environmental outcomes.<sup>46</sup> The NSW's *Water Management Act, 2000* (NSW) similarly includes a definition of 'planned environmental water' committed by management plans for environmental purposes and ecosystem health, and licenced environmental water that is adaptive environmental water, or water taken under a licence.<sup>47</sup>

'Environmental water rules'<sup>48</sup> in the NSW Act importantly provide that a management plan must contain provisions for the identification, establishment and maintenance of planned environmental water. The operation of the environmental water rules in NSW are retrospective as they must be established for all of the water sources in the State as soon as practicable after the commencement of the section.<sup>49</sup> The Victorian *Water Act 1989* (Vic) includes a definition of an 'environmental water reserve',<sup>50</sup> and has enacted an 'environmental water holder',<sup>51</sup> which is a separate statutory body independent from government and responsible for the separate and secure environmental entitlements allowed for under that Act. The EDO submits the ACT ought to move towards creating a similar legal entity as required by its NWI commitment.<sup>52</sup>

#### 4.2 *Environmental water and transparency:*

The WRA, the *Water Resources Environmental Flow Guidelines 2006 (No. 1)* and the Territory Plan 2008 (*Planning and Development Act 2007* (ACT)) provide the statutory

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<sup>42</sup>*Intergovernmental Agreement of a National Water Initiative*, above n 8, cl 35(i).

<sup>43</sup>*Draft ACT Water Strategy* (2013), above n 2, Theme 1, 11.

<sup>44</sup>*Water Act 2007* (Cth) s 4.

<sup>45</sup>*Ibid* s 4.

<sup>46</sup>*Ibid* s 6.

<sup>47</sup>*Water Management Act 2000* (NSW) s 8(1).

<sup>48</sup>*Ibid* s 8(2).

<sup>49</sup>*Ibid* s 8(3).

<sup>50</sup>*Water Act 1989* (Vic) s 4A. The EWR comprises water that is set aside for the environment a) as an environmental entitlement and b) through the operation of i) conditions on any bulk entitlement, licence or permit, ii) any management plan, and iii) any other provision.

<sup>51</sup>*Ibid* s 22DB.

<sup>52</sup>*Intergovernmental Agreement of a National Water Initiative*, above n 8, cl 78(ii).

framework for environmental water in the ACT. These arrangements give the EPA the responsibility for achieving environmental water objectives.<sup>53</sup>

Parts 3 to 6 and Part 10 of the WRA should provide greater transparency regarding the management of water in the ACT. Specifically, transparency for water allocation, its management, metering, monitoring and reporting and compliance. Water Management Agreements (WMAs) should include specific objectives and measurable (performance) indicators to enable confident assessment of the progress made (towards reaching the objectives).

In relation to Environmental Water and Urban Waterways,<sup>54</sup> we note that the outcomes and strategies are aligned with those of the NWI, for example, the outcome of Theme 1 'well managed, functioning aquatic ecosystems that protect ecological values and contribute to the sustainability and livability of the ACT and region,<sup>55</sup> corresponds with the NWI.<sup>56</sup> This is an encouraging outcome, however it will be purely aspirational without specific and clear governance in relation to environmental water.

#### 4.3 *Environmental water and the National Water Initiative (NWI)* *Commitments:*

The Commonwealth Government's NWI and related intergovernmental agreements have attracted much debate and public scrutiny concerning the urgent needs of the water dependant ecosystems and the pathways chosen by all Australian governments to return the system to environmentally sustainable levels of extraction. An important initiative in the MDBP are the provisions requiring accounting for 'environmental water' within that system (or otherwise appropriate institutional structures) with the aim of maintaining and restoring the systems health.

We note Strategy 1 in Theme 1 of the *Strategy 2013* to achieve better water health and environmental flow outcomes,<sup>57</sup> and recommend amendments so as to better provide for and protect the aquatic ecosystems through the introduction of 'environmental water' into the enabling legislation.

The key NWI commitments for '*environmental water*' are the giving of statutory recognition and some degree of security to water access entitlements, as well as fully accounting for their measurement, monitoring and reporting.<sup>58</sup> If water is held as a water access entitlement, making it available to be traded,<sup>59</sup> establishing a register of new and existing environmental water<sup>60</sup> and annual reporting on 'environmental water rules'<sup>61</sup> is required in

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<sup>53</sup> National Water Commission, '2011 Assessment', above n 14, 214.

<sup>54</sup> *Draft ACT Water Strategy 2013*, above n 2, 'Theme 1 – Environmental water and urban waterways', 11.

<sup>55</sup> *Ibid* 5.

<sup>56</sup> *Intergovernmental Agreement of a National Water Initiative* (2004), above n 8, cl 25(ii).

<sup>57</sup> *Draft ACT Water Strategy* (2013), above n 2, 11.

<sup>58</sup> *Intergovernmental Agreement of a National Water Initiative* (2004), above n 8, cl 35(i).

<sup>59</sup> *Ibid* cl 35(iii).

<sup>60</sup> *Ibid* cl 85(j).

the ACT water management system. Such amendments would make it a legal requirement for the Minister or any other authority to secure the environmental water needed to restore and maintain the environmental values and health of aquatic ecosystems as well as aligning the WRA with the *Strategy 2013*.<sup>62</sup>

The Commission's *2011 Assessment* reported that under the WRA, the delivery of environmental water is assured through assessments of compliance and licence conditions by the EPA and that compliance reports are not 'publicly accessible.'<sup>63</sup> And further that the ACT does not produce general purpose environmental water accounts.<sup>64</sup> However, the ACT contributed to the Commission's *Australian Environmental Water Management Report 2010*, which summarises the Territory's environmental water provisions.<sup>65</sup> The EDO again submits that the ACT should be complying with the Commission's requirements in this regard by accounting for environmental water and making these reports publicly available as well as the Commission's recommendations in the above mentioned 2010 report for compliance reports regarding the *Environmental flow guidelines* flow rules.<sup>66</sup>

#### 4.4 *Environmental Water Objective:*

As previously discussed, there is no definition in the WRA for 'environmental water' or its delivery. The EDO recommends that an objective be introduced into the WRA so as to preserve the environmental values and health of water ecosystems. For example, 'The objective of the environmental water is 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.'<sup>67</sup> Such an objective would be in line with the intention of the *Strategy 2013* to maintain environmental values, water-dependent ecosystems and water quality.<sup>68</sup>

#### 5. *Environmental Flows:*

The EDO recognises that environmental flows will encourage resilience (particularly in relation to climate change) over the longer term. Environmental flows are dealt with in Part 3 of the WRA. The EDO wholly supports the provision in that Act that the ecological needs of

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<sup>61</sup>Ibid cl 85(ii).

<sup>62</sup>*Draft ACT Water Strategy* (2013), above n 2, 11.

<sup>63</sup>National Water Commission, 2011 Assessment, above n 14, cl 85(ii), 215.

<sup>64</sup>Ibid cl 85(i), 215.

<sup>65</sup>Ibid.

<sup>66</sup>National Water Commission, *Australian Environmental Water Management, 2012 Review*, 47 <[www.nwc.gov.au/\\_data/assets/pdf\\_file/0019/22168/Australian-environmental-water-management-2012-review.pdf](http://www.nwc.gov.au/_data/assets/pdf_file/0019/22168/Australian-environmental-water-management-2012-review.pdf)>.

<sup>67</sup>As recommended in Environmental Defender's Office Victoria, *Reforming the Environmental Water Reserve. How amendments to Victoria's Water Act could restore river health, May 2010*, 11 <[www.edovic.org.au/downloads/files/law\\_reform/edo\\_vic\\_water\\_report.pdf](http://www.edovic.org.au/downloads/files/law_reform/edo_vic_water_report.pdf)>.

<sup>68</sup>*Draft ACT Water Strategy* (2013), above n 2. See 1.6: Strategies- achieve better water health and environmental flow outcomes, and establish, attain and maintain water quality standards for all ACT water bodies.

aquatic ecosystems are considered in priority to consumptive use when the EPA is preparing the guidelines for environmental flow, but strongly recommends that the differences between the 'ecological needs of aquatic ecosystems' and the 'environmental impacts' referred to in that section be clarified.<sup>69</sup> In practice human water requirements take precedence to environmental needs or agriculture. There is a section in the MDBP dealing with urgent human needs. Urban and 'stock and station' water come first. Consumptive use includes all aspects of consumption, irrigated agriculture being the largest water user. The main issue is the competition between irrigation use and environmental water. When the States are short of meeting the licences volumes, which is quite often, then they cut both irrigation and environmental water. In the last drought NSW cut all the water it had obtained for the Snowy River, and diverted it to Murrumbidgee Irrigation and others. The ACT should avoid the NSW experience where consumptive uses take precedence over the environment in most WSPs.<sup>70</sup> The Wentworth Group has observed:

*'existing allocation rules in many parts of the Basin still accord priority to consumptive uses, despite the fact this runs counter to the National Water Initiative and the Commonwealth's 2007 Water Act'.<sup>71</sup>*

### 5.1 Environmental flows and reporting:

The ACT Environment Protection Authority undertakes compliance monitoring of all licensed water extractions and conducts ongoing monitoring and assessment of environmental flows.<sup>72</sup> The EPA also conducts five-yearly strategic reviews of the *Environmental Flow Guidelines*, which establish the components of flow required to maintain stream health.<sup>73</sup> The ACT Government does not release its annual water report and there does not appear to be an available current or historical reporting on the monitoring of environmental water, an indication of what the environmental rules are and compliance with those rules. The recent *Environmental Flow Guidelines 2013* follows a review of the 2006 *Guidelines* (seeming to supersede the 2011 *Guidelines*).<sup>74</sup> The *Guidelines*, as approved by the Minister,<sup>75</sup> work out

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<sup>69</sup>Section 13(2) In preparing draft guidelines, the authority must consider principally the ecological needs of aquatic ecosystems, but may also take into account the environmental, economic and social impact of the guidelines.

<sup>70</sup>*Water Management Act 2000* (NSW) Part 3 Div. 2.

<sup>71</sup>Wentworth Group of Concerned Scientists (2008), *Submission to the Senate inquiry into the urgent provision of water to the Coorong and Lower Lakes*, 16 as cited in Environmental Defender's Office NSW, *Submission to Standing Committee on Natural Resources Management (Climate Change), Sustainable Water Management Inquiry*, March 2010, 7.

<sup>72</sup>National Water Commission, '2011 Assessment', above n 14, 214.

<sup>73</sup>The Guidelines will be reviewed after five years of operation 'to determine if the ecological objectives specified are the most appropriate, and the environmental flows required achieve those objectives': *2006 Environmental Flow Guidelines*, 11 <[www.environment.act.gov.au/\\_data/assets/pdf\\_file/0010/151948/Environmental\\_Flow\\_Guidelines\\_Jan2006.pdf](http://www.environment.act.gov.au/_data/assets/pdf_file/0010/151948/Environmental_Flow_Guidelines_Jan2006.pdf)>.

<sup>74</sup>Despite the provision in the 2006 Guidelines for a 5 year review, the EDO is of the opinion that an assessment every 5 years is too long in light of the rapid changes in weather events.

<sup>75</sup>WRA s 12(1).

‘the flow of water that is needed to maintain aquatic ecosystems’<sup>76</sup> and aim to ensure the health of waterways, streams, heavily used systems and highly modified systems.<sup>77</sup> The 2013 *Guidelines* have developed a framework for monitoring and assessment, adapted from that developed by Cottingham *et al* (2004) in *Environmental Flows Monitoring and Assessment Framework*.<sup>78</sup> As the proposed framework is described in very general terms, it is difficult to assess whether it will be able to account for whether environmental flows are delivered. The focus of the methodology also seems to be on understanding the ‘flow-ecology relationships’, and achieving ‘ecological objectives’.<sup>79</sup> While it is commendable that ecological objectives are considered in the study design, it is crucial that the monitoring and assessment framework not only seeks to ensure environmental outcomes, but that it accounts for whether environmental flow is delivered. The methodology should be revised to give this consideration greater weight. The framework also seeks to rely in part on ‘licence based monitoring’<sup>80</sup> under the WRA. The difficulties with the monitoring and enforcement of licences under the WRA are identified in this submission below.

### 5.2 *Environmental flows and a sustainable baseflow:*

In the ACT, the 2013 *Guidelines* identify separate components of protected environmental flows including a base flow which is mainly contributed by groundwater, and is the minimal volume of water that the stream needs to support aquatic biodiversity and protect water quality.<sup>81</sup> Under the WRA, the Minister is vested the right to the use, flow and control of all Territory water.<sup>82</sup> The Minister may approve guidelines (environmental flow guidelines) for working out the flow of water that is needed to maintain aquatic ecosystems.<sup>83</sup> A thorough analysis of this aspect of water management is beyond the scope of this submission,<sup>84</sup> however the EDO recommends that an amount of baseflow should be allocated to maintain an ecological balance before that allocated for consumptive purposes. This baseflow can be referred to as a ‘sustainable baseflow’ which reflects the minimum level of water that must remain in the water system to make sure future extraction is sustainable in the long term.<sup>85</sup> This requirement for a minimum amount of flow ought to be incorporated into the water management framework and made enforceable by amending the enabling legislation. Measuring the baseflow in such a way ensures the health of the

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<sup>76</sup> *Ibid.*

<sup>77</sup> *Environmental Flow Guidelines 2013*, 1.

<sup>78</sup> *Ibid* 34.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid* 16.

<sup>82</sup> WRA s 7.

<sup>83</sup> *Ibid* s 12.

<sup>84</sup> For more detail please see: Environmental Defenders Office, Victoria, *Reforming the Environmental Water Reserve: How amending Victoria's Water Act could restore river health*, above n 67.

<sup>85</sup> *Ibid* 14.

aquatic system, including groundwater and surrounding water dependant ecosystems as well as maintaining quality of water for environmental and consumptive objectives as well as social, economic, and public health outcomes.<sup>86</sup> It necessarily follows that such an amendment to the 2013 *Guidelines* and the WRA would restrict the amount of water issued by future water entitlements and extraction licences. If the minimum amount of baseflow has reached capacity, the (proposed) adaptive management will allow some flexibility during the times the ecosystem can sustain appropriate use.<sup>87</sup> It will also safeguard the requirements of the NWI for sustainable use currently capped at a net sustainable diversion limit (SDL) of 40.5 GL for surface water.<sup>88</sup>

The EDO recommends a regime whereby there is the monitoring and assessment of what is a sustainable flow, the use of sustainable extraction methods and the implementation of measures to ensure the use stays within the recommended (sustainable) levels. In particular, we refer to the *Strategy 2013* and its recognition for the need for allocation within sustainable limits.<sup>89</sup>

### *5.3 Environmental flows and the National Water Initiative Commitments:*

The Commission's 2011 *Biennial Assessment* referred to Clause 101 of the *Intergovernmental Agreement* to identify the key science priorities to support implementation of the NWI and to implement any necessary measures to ensure the research effort is well coordinated and publicised and any gaps are addressed.<sup>90</sup> It found that in the ACT, no specific work has been undertaken to identify key science or knowledge and capacity priorities to assist in the implementation of the NWI. Nor does the ACT have internal strategic workplace knowledge, skills and capacity-building program for its staff. Moreover, a knowledge gap exists concerning the effectiveness of the Territory's environmental flows.<sup>91</sup> The EDO submit that this 'knowledge gap' ought to be addressed, and recommends that co-ordinated scientific based research in key areas including the nature of groundwater as well as best practice in water planning management be pursued. The ACT Government should be proactive in its research to achieve a water management system that prioritises environmental flows based on ecologically sustainable development (ESD) and science based criteria. Ensuring environmental flows for ecosystem health is essential to create resilient ecosystems in light of climate change.<sup>92</sup>

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<sup>86</sup>*Draft ACT Water Strategy* (2013), above n 2, 1.

<sup>87</sup>*Ibid* Theme 2: 'An integrated and efficient water supply system that...is adaptive to change', 1.

<sup>88</sup>*Murray Darling Basin Plan*, (2012), Schedule 3, 199 and *Draft ACT Water Strategy* (2013), above n 2, 29.

<sup>89</sup>*Draft ACT Water Strategy* (2013), above n 2, 29.

<sup>90</sup>National Water Commission, 2011 Assessment, above n 14, 217.

<sup>91</sup>*Ibid*.

<sup>92</sup>Environmental Defender's Office NSW, *Submission to Standing Committee on Natural Resources Management (Climate Change) Sustainable Water Management Inquiry*, March 2010, 2<[www.edo.org.au/edonsw/site/pdf/subs/100315water\\_management.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/100315water_management.pdf)>.

Adequate flows allow the proper functioning of aquatic ecosystems as they have a direct and significant impact as well as diluting contaminants such as salt and blue-green algae.<sup>93</sup> It is well known that Canberra's iconic Lake Burley Griffin is affected by unacceptable levels of blue-green algae.<sup>94</sup> The *State of Environment Report 2011*, while not focusing specifically on Lake Burley Griffin, stated that recent data has shown that 'river health and catchment condition are improving within the ACT'.<sup>95</sup> However, ACT lakes and ponds continue to have high levels of nutrients, which lead to toxic blue-green algae. The Report contends that 'greater focus is needed on the management of ACT lakes to improve water quality'.<sup>96</sup> The consequences of ensuring environmental flows are incorporated into all water use entitlements and the setting of environmental flow allocations by reference to natural flows rather than total allocations is discussed in the above mentioned EDO NSW submission. In that submission the EDO NSW also recommended all entitlements should include methodology for managed environmental releases from stored water and stated the ecological values to be protected by the entitlement (which in NSW is the WSP).<sup>97</sup> A consequence of these measures would reduce the risk that the health of rivers is seriously degraded, would benefit all water users, help protect rivers' ecological processes and dependent ecosystems, dilute in-river toxicants and reduce the risk of critical water quality events.<sup>98</sup> In the ACT, details of water entitlement and licences are publicly available, however their position on the Register does not make them as readily accessible as they would be if available online.<sup>99</sup> As a result, it may be difficult for stakeholders to accurately identify the methodology used and to assess the amounts of water that are allocated for the environment. In this respect the EDO is concerned that lack of monitoring in this regard may result in a low incentive for accountability and as a result the amount of environmental flow may be determined by the amount of water needed by individual water users rather than by the environmental objectives. The EDO recommends the ACT Government's water management system ought to preference environmental flows based on ESD and science based criteria as well as incorporating such measures into the terms and conditions of water allocation.

#### 5.4 Environmental flows and groundwater:

The surface water and groundwater systems of the ACT are considered to be highly connected. As a result, ACT surface water and groundwater are managed as one water

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<sup>93</sup> Ibid 9.

<sup>94</sup> National Capital Authority, 2012 Media Releases: *Extreme Blue-Green Algae Alert for Lake Burley Griffin*, 27 January 2012 <[www.nationalcapital.gov.au/index.php?option=com\\_content&view=article&id=2241:weston-park-west-and-yarramundi-reach-remain-closed-to-swimming&catid=136:2012-media-releases&Itemid=859](http://www.nationalcapital.gov.au/index.php?option=com_content&view=article&id=2241:weston-park-west-and-yarramundi-reach-remain-closed-to-swimming&catid=136:2012-media-releases&Itemid=859)>.

<sup>95</sup> *ACT State of Environment Report, 2011*, above n 4, 3.

<sup>96</sup> *ACT State of Environment Report, 2011*, above n 4, 4.

<sup>97</sup> Environmental Defender's Office NSW, *Submission to Standing Committee on Natural Resources Management (Climate Change), Sustainable Water Management Inquiry*, above n 92, 10.

<sup>98</sup> Ibid.

<sup>99</sup> National Water Commission, 2011 Assessment, above n 14, 211.



resource.<sup>100</sup> The *Strategy 2013* acknowledges the ‘interconnectedness of groundwater and surface water resources’,<sup>101</sup> as well as the need to manage surface and groundwater resources for ‘rural and urban use that optimises economic, social and environmental outcomes’.<sup>102</sup> The integration of ACT groundwater and surface water systems is commendable as it enables an integrated management of water resources and avoids the potential for ‘double accounting’ water (once as groundwater and a second time as the base flow of rivers). In NSW, double accounting has had the effect of reducing the security of supply to surface water users and effectively creating the illusion that there is more water to extract. This is cause for concern if water availability is reduced under a future climate.<sup>103</sup> The *ACT State of the Environment Report 2011* also noted the importance of groundwater, and suggested that over-extraction ‘could affect the health of groundwater-dependent ecosystems, and the continuing availability of groundwater for human use’.<sup>104</sup> The Report argued that ‘improved monitoring of groundwater’ is needed to provide ‘greater knowledge and understanding of groundwater in the ACT’,<sup>105</sup> and recommended that a ‘complete assessment of the ACT’s at-risk groundwater resources’ be undertaken.<sup>106</sup> However, the *2013 Guidelines* do not mention groundwater as an area in which further research is required.<sup>107</sup> The EDO recommends the ACT government action the finding in *State of Environment Report 2011* to commit investment into additional scientific research into the connectivity between surface and ground water systems.<sup>108</sup>

## **6. Monitoring and Enforcement:**

In the EDO’s opinion, effective regulatory framework is undermined where there is a lack of regular monitoring and enforcement and for this reason these components are essential for the efficient operation of any governance regime.

### *6.1 Transparency in decision making:*

To be in line with national water planning guidelines, the ACT water management and planning framework, including the *Strategy 2013*, needs to be more transparent around decision making. The National Water Commission said of the ACT water plan, that ‘although

<sup>100</sup> National Water Commission, 2011 Assessment, above n 14, 214.

<sup>101</sup> *Draft ACT Water Strategy*, above n 2, 3.

<sup>102</sup> *Ibid* 27.

<sup>103</sup> Environmental Defender’s Office NSW, Submission to Standing Committee on Natural Resources Management (Climate Change), *Sustainable Water Management Inquiry*, above n 92, 9.

<sup>104</sup> Office of the Commissioner for Sustainability and the Environment, ‘Land and Water Theme Paper’, *ACT State of the Environment Report* (2011) 6.

<sup>105</sup> *Ibid*.

<sup>106</sup> *Ibid* 9.

<sup>107</sup> *Water Resources Environmental Flow Guidelines 2013*, 35–36.

<sup>108</sup> Office of the Commissioner for Sustainability and the Environment, ‘Land and Water Theme Paper’, *ACT State of the Environment Report* (2011) 9.

it is clear that the public was consulted during the development of the plan, the processes associated with the decision making and trade-offs lacked transparency (NWI Clause 95(iii)).<sup>109</sup> The *Strategy 2013* acknowledges that the NWC maintained that the water sector needs to be transparent and build 'a proactive culture of complete openness to stakeholders and the public about performance and decision making'.<sup>110</sup> In line with recommendations from the NWC, the *Strategy 2013* needs to deliver transparent decision making into the future and allow access to the detail of the consultation undertaken to arrive at water planning and management decisions. In this submission the EDO recommends that there ought to be more transparency in the various decision making processes provided by the WRA to the Minister and to the EPA.

The WRA lists requirements for consultation for the *Environmental flow guidelines*,<sup>111</sup> however there is no other requirement for public consultation for matters such as major projects in water planning and for the giving of entitlements and licenses. The EDO recommends public consultation is necessary as these matters may have significant impact on the aquatic ecosystem and the water dependant ecosystems.

The WRA should require the Minister and the EPA to publicly notify an intention to allocate water resources.<sup>112</sup> Such allocations affect the water system as a whole and it is therefore in the public interest that interested parties be consulted. Accordingly, the WRA should allow for public consultation at least in relation to allocations with the potential for major impacts and to publish the granting of any entitlement or licence including what the likely environmental impacts will be.

Decisions for major projects and the giving of entitlements and licences are not reviewable under the Act and are therefore not subject to independent review pursuant to *the ACT Civil and Administrative Tribunal Act 2008 (ACT)*.<sup>113</sup> The EDO recommends that the WRA be amended in respect of major projects in water planning so that it is aligned with other ACT planning laws such as the ability to lodge an objection to a Development Application with the potential opportunity for an ACAT review in certain circumstances.<sup>114</sup> The EDO also recommends that similar amendments be made for the issuing of water entitlements and licences likely to have a sizeable impact on the water resource regime and dependant ecosystems.

## 6.2 Transparency in water allocation:

Water allocation via the licencing system in the ACT is subject to licencing conditions pursuant to s 31 of the WRA. This section specifies conditions which may attach to the licence. A greater transparency and accountability would evolve if some of these licencing conditions were mandatory. The EPA, being one of the authorities responsible for water

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<sup>109</sup> National Water Commission, 2011 Assessment, above n 14, 217.

<sup>110</sup> *Draft ACT Water Strategy (2013)*, above n 2, 28.

<sup>111</sup> WRA, s 14.

<sup>112</sup> Pursuant to Part 4 and 5 of the WRA.

<sup>113</sup> The WRA, Schedule 1 lists the 'Reviewable Decisions'.

<sup>114</sup> Section 156, Ch. 13 – Review of Decisions and Schedule 1 of the *Planning and Development Act 2007 (ACT)*.

management as well as monitoring and enforcement,<sup>115</sup> must be adequately informed with specific data regarding the influence of licencing conditions on compliance levels. It is the EDO NSW experience that difficulties arise in the assessment of the performance of water management plans (pursuant to NSW Water Sharing Plans) against mandatory rules due to gaps in monitoring and data collection.<sup>116</sup>

We note 100% of licenced extraction in the ACT is metered with the exception of stock and domestic use of surface water.<sup>117</sup> We commend the ACT government for this not insignificant achievement, however it is meaningless unless it is effectively and routinely monitored, the extraction reported and enforced in circumstances where there has been a breach and the adoption of an effective compliance policy.<sup>118</sup>

Irregular monitoring or lengthy intervals between meter reading may result in a delay of compliance and enforcement actions until well after the breach has occurred. This has the potential to exacerbate potential impacts on the environment and other users and opens the potential for malfunctions to remain undetected for extended periods.<sup>119</sup>

### 6.3 Transparency in environmental flow:

The *Strategy 2013* describes a framework for water planning which seeks to establish sustainable water management.<sup>120</sup> However, to achieve sustainable management, the framework must have integrity and the capacity to be enforced. When monitoring and enforcement is inadequate it can create disincentives to comply with the legislation and thus disincentives to sustainable water management.<sup>121</sup>

The Monitoring and Assessment Program as developed in the recent *Environmental Flow Guidelines 2013* states it will review the appropriateness of the ecological objectives and indicators identified in the *Guidelines* and evaluate the effectiveness of the environmental flows in maintaining these ecological objectives.<sup>122</sup> However, it appears the Program described in the *Guidelines* is, in our opinion, too general to achieve this purpose and to reliably assess the impact of water allocation as allowed under the WRA (via entitlements and licences) on the aquatic ecosystems. In our view the Program is not consistent with the commitment made pursuant to the *Intergovernmental Agreement* in relation to the

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<sup>115</sup> National Water Commission, 2011 Assessment, above n.14 at C179(i)d said the ACT EPA undertakes compliance monitoring of all licensed water extractions and conducts ongoing monitoring and assessment of environmental flows. The EPA also conducts five-yearly strategic reviews of the *Environmental flow guidelines*, which establish the components of flow required to maintain stream health; Part 6 to 10 of the WRA.

<sup>116</sup> *Submission to the Natural Resources Commission regarding the Review of 31 Water Sharing Plans in NSW*, EDO NSW February 2013, 12 <[www.edo.org.au/edonsw/site/pdf/subs/130211Review\\_WSPs\\_NSW.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/130211Review_WSPs_NSW.pdf)>.

<sup>117</sup> National Water Commission, 2011 Assessment, above n 14, 215.

<sup>118</sup> We note the provisions in the WRA, Part 9A, particularly s 77G.

<sup>119</sup> EDO NSW Report, above n 116, 13.

<sup>120</sup> *Draft ACT Water Strategy 2013*, above n 2, 3, 9, 10.

<sup>121</sup> EDO NSW, Submission to the NSW Legislative Assembly Standing Committee on Natural Resource Management Inquiry into disincentives for ecologically sustainable land and water use in NSW, 19 May 2005, 4 <[www.edo.org.au/edonsw/site/pdf/subs/050511nat\\_res.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/050511nat_res.pdf)>.

<sup>122</sup> *Environmental Flow Guidelines 2013*, 34.

Outcome for Water Resource Accounting, namely an agreement to ensure that adequate measurement, monitoring and reporting systems are in place to support public and investor confidence in the amount of water being traded, extracted for consumptive use and recovered and managed for environmental and other public benefit outcomes.<sup>123</sup> The EDO recommends the provision of clear requirements within the *Guideline's Program* for the compliance with terms and conditions of water usage, including their incorporation into the WRA along with appropriate penalties for non-compliance. The EDO has previously submitted that nature conservation requires the goals and objectives of environmental protection legislation to be complied with. Such laws are only effective when supported by fully operational monitoring and enforcement mechanisms and options.<sup>124</sup> The EPA should be equipped with the tools and the resources to monitor compliance with water allocation conditions and take enforcement action for any breaches.<sup>125</sup>

#### 6.4 *Transparency in Water Accounting:*

The NWI obligates Parties to develop and implement water accounting.<sup>126</sup> However the Commission's 2011 Assessment found that the ACT does not have consolidated water accounting and has not yet adopted the water accounting standards.<sup>127</sup> The ACT government has reported that it intends to apply the accounting standards in information management for its water systems in the future.<sup>128</sup> Further, it has participated in the development of national water accounting standards and reporting frameworks, including the *Water Accounting Conceptual Framework* and the *Preliminary Australian Water Accounting Standards (AWAS)*.<sup>129</sup> The EDO recommends the adoption and implementation of the Water Accounting Conceptual Framework (WACF) into the accounting regime. A crucial component of the NWI is to achieve harmony between States when it comes to the respective water management regimes. The purposes of the WACF include assisting water accounting standard setters to develop future AWAS consistent with the framework and to review existing AWAS and assisting water accounting standard setters to promote the comparability and harmonisation of current or potential national and international water accounting regulations, and standards and procedures, relating to the preparation and presentation of General Purpose Water Accounting Reports.<sup>130</sup>

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<sup>123</sup> *Intergovernmental Agreement*, above n 8, cl 80, 17.

<sup>124</sup> *EDO (ACT) Submission to Budget Consultation Process 2013*, April 2013, 1  
<[www.edo.org.au/edoact/submissions/EDO%20\(ACT\)%20Submission%20to%20Budget%20Consultation%20Process%202013%20-%202014.pdf](http://www.edo.org.au/edoact/submissions/EDO%20(ACT)%20Submission%20to%20Budget%20Consultation%20Process%202013%20-%202014.pdf)>.

<sup>125</sup> See also: *EDO (ACT) Submission on the Review of the Environment Protection Act 1997 (ACT)*, November 2012  
<[www.edo.org.au/edoact/submissions/EDO%20Submission%20Nov%202012%20-%20Review%20of%20EPA%201997.pdf](http://www.edo.org.au/edoact/submissions/EDO%20Submission%20Nov%202012%20-%20Review%20of%20EPA%201997.pdf)>.

<sup>126</sup> National Water Commission, *NWI Objectives*, above n 13, cl 82(i).

<sup>127</sup> National Water Commission, *2011 Assessment*, above n 14, 215.

<sup>128</sup> *Ibid.*

<sup>129</sup> National Water Commission, *2011 Assessment*, above n 14, 215.

<sup>130</sup> *Water Accounting Conceptual Framework for the Preparation and Presentation of General Purpose Water Accounting Reports*, Water Accounting Standards Board, 11 May 2009, 7.

## 6.5 Transparency in Reporting:

Water planning in the ACT appears to lack a robust monitoring and reporting framework. The *ACT Water Report* has been produced annually from 1996, but has not been made public since 2009. The reports cover water resources (allocations, licences), water condition (quality) and community activities.<sup>131</sup> As the annual *Water Report* has not been made publicly available since 2009 there is currently no recent and comprehensive data available regarding ACT water management and therefore no memory indicators or comparables available to the public. Currently, the ACT does not publicly report on the implementation of its water plan, however the ACT advised that from 2010–11 it intends to report on the implementation of water planning annually through the *ACT Water Report*.<sup>132</sup>

The EDO urges the ACT government to align its policy with this NWI requirement, namely the provision of accurate and timely information to all relevant stakeholders in relation to the progress of water plan implementation and other issues relevant to the security of water access entitlements.<sup>133</sup> Under the *Intergovernmental Agreement*, the parties agreed the outcome for integrated management of environmental water is to identify within water resource planning frameworks the *environmental and other public benefit outcomes* sought for water systems and to implement measures to achieve those outcomes including the establishment and equipping of accountable environmental water managers with the necessary authority and resources to provide sufficient water at the right times and places.<sup>134</sup> And further an agreement to establish effective and efficient management and institutional arrangements including environmental water managers accountable for the management of environmental water provisions and the periodic independent audit, review and public reporting of the achievement of those (environmental and other public benefit) outcomes clause 79(i)(d).<sup>135</sup>

For its 2011 Assessment, the Commission focused on whether the key requirements for managing environmental water effectively are being met, including whether accountable environmental water managers have been established with the necessary resources and authority to manage environmental water effectively and whether effective monitoring, evaluation and reporting arrangements are in place. The NWI concluded that while it was clear that the Initiative has influenced the development of frameworks and systems for improved water management across Australia and that many of the frameworks, policies and strategies agreed to in the NWI are in place, the full impact of those arrangements will not be seen until there is another extended dry period.<sup>136</sup>

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<sup>131</sup>National Water Commission, *2011 Assessment*, above n 14, cl 95(ii), 217.

<sup>132</sup>Ibid cl 40(iii), 211.

<sup>133</sup>Ibid cl 96, 217.

<sup>134</sup>*Intergovernmental Agreement*, above n 8, cl 78(ii), 16.

<sup>135</sup>Ibid cl 79(i)(a) and (d), 16.

<sup>136</sup>National Water Commission, *2011 Assessment*, Chapter 3 – Sustainable Water Management, 3.6 Environmental Water Management, 210 <<http://www.nwc.gov.au/publications/topic/assessments/ba-2011/sustainable-water-management#sec-3-p7>>.

The EDO notes the ACT's intention to establish a peak oversight group in the Directors General Water Group (DGWG).<sup>137</sup> The EDO submits the DGWG should be a statutory authority with powers and duties set out in the legislation. The DGWG should be responsible for the overall management and delivery of all water within the control of relevant government directorates. The DGWG should be required to maintain water management accounts and report to the public annually on the delivery of the water services against the desired outcomes of the ACT water management framework. It is also necessary that the ACT provide an environmental water holder as a separate statutory body responsible for the management and delivery of environmental water so as to comply with the NWI commitment to establish an environmental water manager with the necessary resources and authority to manage environmental water effectively.<sup>138</sup> We note the State of Victoria has established an environmental water holder.<sup>139</sup>

## **7. Indigenous consultation:**

The *Strategy* 2013 says that it will promote community involvement in management of ACT water resources and community consultation for water planning in the ACT.<sup>140</sup> More particularly, the *Strategy* says that it will 'provide long-term guidance for the management of the Territory's water resource'<sup>141</sup> and secure 'the social, economic and environmental needs of the ACT community.'<sup>142</sup>

### *7.1 Recognition of cultural flows in water planning:*

The ACT as a party to the *Intergovernmental Agreement* has agreed to 'the inclusion of Indigenous representation in water planning wherever possible' and to ensure that 'water plans will incorporate Indigenous social, spiritual and customary objectives and strategies for achieving these objectives wherever they can be developed.'<sup>143</sup>

In line with recommendations from the Commission, water planning in the ACT should include consultation with all stakeholders including Indigenous groups and individuals as part of the planning process. The Commission's *2011 Assessment* deals with Indigenous access to water sources and states that the 'interests of Indigenous people need to be included in water planning' and that the focus should be on using consultation processes to 'more explicitly account for Indigenous water values and requirements in water planning' and to build 'the capacity of Indigenous leaders to participate in water planning and

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<sup>137</sup> *Draft ACT Water Strategy 2013*, above n 2, 21.

<sup>138</sup> *Intergovernmental Agreement 2004*, above n 8, 16.

<sup>139</sup> *Water Act 1989* (Vic), s 22DB; see also EDO Victoria, *Reforming the Environmental Water Reserve* report, above n 84 for a persuasive argument in favour of establishing an environmental water holder.

<sup>140</sup> *Draft ACT Water Strategy* (2013), above n 2, i.

<sup>141</sup> *Ibid* iii.

<sup>142</sup> *Ibid* 6.

<sup>143</sup> *Intergovernmental Agreement 2004*, above n 8, s52 (i) and (ii).

management, including by recognition of Indigenous knowledge of water systems.’<sup>144</sup> The *2011 Assessment* at Clauses 52–54 reports that the ACT has statutory requirements to consult all stakeholders, including Indigenous groups, in the development of water plans and to identify their water values and the water requirements to maintain them’. It appears that the concept of a public consultation is formalised in one provision only in the WRA in relation to the preparation of the *Environmental flow guidelines*.<sup>145</sup> Although the *Guidelines* are an important document and the *Strategy 2013* encourages a collaborative and participative approach to deciding Actions outlined in the *Strategy*, in particular to include the community and relevant stakeholders in decision making,<sup>146</sup> the EDO is of the opinion that the process for providing information regarding the water planning implementation does not go far enough for several reasons including those described by the Commission in its *2011 Assessment*.<sup>147</sup>

The *Strategy 2013* does not mention that any Indigenous consultation has or will be carried out, nor is this mentioned as a statutory requirement in the WRA. It has not indicated that water planning will consider Indigenous social, spiritual and customary objectives in any way. To come into line with the Commission’s recommendations and the *Intergovernmental Agreement*, the ACT Government should indicate whether Indigenous consultation has or will be carried out and if not it must explicitly account for Indigenous water values and requirements in water planning and build the capacity of Indigenous leaders to participate in water planning and management. The ACT Government needs to ensure that these objectives are prioritised in water planning. Indigenous people are specially and disproportionately impacted by water planning.<sup>148</sup> The Environmental Defenders Office of Victoria identified that Indigenous people in water planning were ‘specially affected by the governance reform process for the future management of the Murray-Darling Basin system’ and their input into water planning needs to be recognised in a substantive way.<sup>149</sup>

The EDO supports recognition of processes where Indigenous consultation and cultural significance is supported in a way that is substantive rather than symbolic.<sup>150</sup> This includes

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<sup>144</sup> The National Water Commission, *The National Water Initiative – securing Australia’s water future 2011 assessment* (2011), 1.4n. <[www.nwc.gov.au/publications/topic/assessments/ba-2011/governance#sec-1-p5](http://www.nwc.gov.au/publications/topic/assessments/ba-2011/governance#sec-1-p5)>.

<sup>145</sup> WRA, s 14.

<sup>146</sup> *Draft ACT Water Strategy* (2013), above n 2, 21.

<sup>147</sup> National Water Commission, *2011 Assessment*, above n 14, Cl95(iii), 217. Water planning is participatory and consultative in the ACT. It involves initial notification and consultation with the community and stakeholders, the public exhibition of draft plans and the use of stakeholder advisory committees. Although it is clear that the public was consulted during the development of the plan, the processes associated with decision making and trade-offs (i.e. how the results of the public consultation were used to make decisions) lacked transparency. A further example of lack of transparency is at Cl67 - Water management and planning costs have been recovered since 1999 through the ACT’s water abstraction charge (WAC). The charge remains subject to a legal challenge. Concerns have been raised about the transparency of the charge.

<sup>148</sup> Environmental Defenders Office, Victoria, *Environmental Justice Project; Final Report*, 25 <[www.edovic.org.au/downloads/files/law\\_reform/edo\\_vic\\_environmental\\_justice\\_report.pdf](http://www.edovic.org.au/downloads/files/law_reform/edo_vic_environmental_justice_report.pdf)>.

<sup>149</sup> *Ibid* 4.

<sup>150</sup> EDO ACT submission to the *Heritage Legislation Amendment Bill 2013*, 19 June 2013, 8 <[www.edo.org.au/edoact/submissions/EDO%20submission%20-%20Heritage%20Amendment%20Bill%202013.pdf](http://www.edo.org.au/edoact/submissions/EDO%20submission%20-%20Heritage%20Amendment%20Bill%202013.pdf)>.

consultation with Indigenous communities and recognition of cultural significance in water planning and water policy.

Furthermore, in contrast with NSW, the ACT does not appear to have planned for the recognition of cultural significance in water planning. The Commission's 2011 *Assessment* at clause 52-53 indicated that NSW undertook a state-wide program of consultation to identify water dependant cultural assets to be considered in state water planning.<sup>151</sup> There is no indication that the ACT has done this type of assessment. The EDO submit the ACT water strategy should indicate recognition of cultural values, and that this would be consistent with the *Human Rights Act 2004* (ACT).

## 7.2 Cultural flows:

The *Intergovernmental Agreement* requires water access entitlements and planning frameworks to recognise Indigenous needs in relation to water access and management.<sup>152</sup> In its 2009 report the NWC found that:

*'Indigenous water requirements appear to be rarely explicitly included in water plans. There is commonly an implicit assumption that environmental flows (typically rules-based environmental water) will serve as a surrogate mechanism to meet Indigenous social, cultural or spiritual requirements.'*<sup>153</sup>

The Commission found this did not enable Indigenous people to benefit from the economic development opportunities that might otherwise be provided and recommended further exploration of Indigenous needs in relation to water access and management, and mechanisms to meet those needs.<sup>154</sup>

The EDO NSW has also submitted that the WSPs must provide cultural flows to Indigenous people.<sup>155</sup> That report further stated that 'cultural flow' is 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.'*<sup>156</sup>

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<sup>151</sup>National Water Commission, 2011 *Assessment*, above n 14, 222.

<sup>152</sup>*Intergovernmental Agreement on a National Water Initiative*, 2004, above n 8, Cl25.

<sup>153</sup>National Water Commission (2009) *Australian water reform 2009. Second biennial assessment of progress in implementation of the National Water Initiative* at 121.

<sup>154</sup>Ibid.

<sup>155</sup>EDO NSW, *Submission to Standing Committee on Natural Resource Management (Climate Change) -Sustainable Water Management Inquiry*, above n 92, 13.

<sup>156</sup>Murray Lower Darling Rivers Indigenous Nations (MLDRIN) 2008 - *Cultural Water Brief*. Prepared by Environmental Defenders Office (NSW).



The EDO NSW have further submitted that providing cultural flows for Indigenous people would be consistent with international agreements such as the *Declaration of Rights for Indigenous Peoples*, endorsed by Australia on 3 April 2009, which refer to Indigenous peoples' rights to access resources which includes water as a clear cultural need.<sup>157</sup> This issue is aggravated by the high probability that an allocation of 'cultural water' can be on-sold to the irrigation industry. It cannot be assumed that it is environmental water, but has to be considered consumptive water.

### **8. Adaptive management/best practice in water management:**

For a regulatory framework to have teeth, it must fulfil two basic requirements. First, it must strive to implement ecologically sustainable development (ESD). Second (and in order to translate ESD into outcomes), it must be based on best-available science, which requires governments to fund specialised research units over the long term.<sup>158</sup> The NWI requires clear action to ensure adequate and secure environmental flows through water management plans based on the best scientific information.<sup>159</sup> The EDO submit the ACT Government must adhere to its commitment to the NWI and its vision in the *Strategy 2013*, that it secure water for aquatic ecosystem health and to provide security for environmental water and flows.<sup>160</sup> Environmental water and flows must take priority to ensure the long-term maintenance of aquatic ecosystems and to guarantee integrity and long term security of these systems. We note an outcome of the *Strategy 2013* is for an integrated and efficient water supply system that is adaptive to change and secures the social, economic and environmental needs of the ACT community.<sup>161</sup>

Compared to the rest of the States and Territories, the ACT has a relatively small aquatic ecosystem for which it is responsible. However the ACT forms a part of NSW and a holistic approach is, in our opinion, the best approach. In this regard we note the environmental flow approach adopted in the *Guidelines*.<sup>162</sup>

The EDO notes with some concern that there is clear scientific evidence that water-based ecosystems in NSW, which are already under threat from over-extraction and reduced flows, will be further strained by climate change.<sup>163</sup> Climate change poses a significant challenge to water management in NSW as it will intensify the difficult task of returning ecosystems to sustainable levels of water extraction 'while the climate bar keeps rising.'<sup>164</sup>

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<sup>157</sup> EDO NSW, *Submission to Standing Committee on Natural Resource Management (Climate Change) -Sustainable Water Management Inquiry*, above n 92, 13. .

<sup>158</sup> *Exemptions from cease-to-pump rules in the Hunter coal field: mines 1, aquifers 0*, Emma Carmody, EDO NSW, Australian Environment Review, 2013 Vol 28 No 4, 569.

<sup>159</sup> *Intergovernmental Agreement on a National Water Initiative*, 2004, above n 8, Cl35-36, 7.

<sup>160</sup> *Draft ACT Water Strategy 2013*, above n 2, 11.

<sup>161</sup> *Ibid* 12.

<sup>162</sup> *Environmental Flow Guidelines, 2013*, 15.

<sup>163</sup> EDO NSW Report, above n 92, 2.

<sup>164</sup> *Ibid* 2 quoting Ken Matthews, National Water Commission, *Building resilience through water reform*, presentation given on 18 February 2010 <[www.nwc.gov.au/resources/documents/Aus21\\_Resilience\\_Presentation\\_17\\_Feb\\_2010.pdf](http://www.nwc.gov.au/resources/documents/Aus21_Resilience_Presentation_17_Feb_2010.pdf)>.

In its report, the EDO NSW has submitted that there is a pressing need for the water management regime in NSW to incorporate climate change projections into decision-making and to ensure fundamental ecosystem health through environmental flows.

Due to the smaller catchment area the ACT is in a better position to be adaptive to the changing conditions and to modify its management arrangements relatively quickly as compared to the other states. Indeed the *Strategy 2013* proposes a focus on management structures under an approach of total water system management, incorporating integrated catchment management and to ensure that in the future, all our water resources are managed to achieve water quality appropriate to the landscape. In addition, improved catchment management will see improvements in the quality of water available both to the ACT and to downstream users in the Basin.<sup>165</sup> The EDO encourages the ACT to accept this challenge and position itself as a national leader in adaptive management modeling and to invest in additional scientific research so that the water management system, including allocations, is based on the best available ecological science.

The NWI recommended risk assignment framework to be implemented immediately for all changes in allocation not provided for in over allocation pathways in water plans.<sup>166</sup> The WRA does not address the assignment of risk arising from future changes in the availability of water for the consumptive pool. In 2009, the ACT informed the Commission that provisions would be included in amended legislation in 2009. However, the ACT has not reported any such revisions to the *Water Resources Act 2007*.<sup>167</sup>

The WRA should be amended to include a requirement that water management during periods of extreme drought should reflect best available science allowing for flexibility to protect and consider the overall health of the aquatic ecosystem in times of drought and the continuing impacts of climate change. We note this would also be achieved by a specification for the security of environmental water within the ACT management and allocation systems.

It is safe to say the ACT government accepts that water availability is under pressure as a result of climate change.<sup>168</sup> A sustainable system is essential to deliver sufficient environmental flow to the aquatic ecosystem so that it might restore, maintain and assume resilience in the event of more frequent and increased periods of drought. Policies surrounding drought management and drought assistance should focus on drought preparedness and risk management rather than drought response and damage control.<sup>169</sup> Water allocation pursuant to the WRA needs to be flexible in light of the adaptive management forecasted in the *Strategy 2013* for the water system as well as aligning it with the NWC requirements. This could be achieved with amendments to the WRA so that water allocation entitlements and licences can be amended (with reasonable notice) if there is a

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<sup>165</sup> *Draft ACT Water Strategy 2013*, above n 2, i.

<sup>166</sup> National Water Commission, '2011 Assessment', above n 14, Cl46-50, 211.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Draft ACT Water Strategy, 2013*, above n 2, iii.

<sup>169</sup> EDO NSW Report, above n 121, 4.

need to increase environmental flow and environmental water if new scientific information so recommends, or if it is to bring it into line with best practice that the ACT Government is willing to adopt. We are of the opinion that any such changes should not be compensated and ought to be made part of the terms and conditions of every water allocation.

If the ACT government wishes to ameliorate the impacts of climate change it should encourage and implement widespread innovative measures to ensure best practice water conservation and management. These measures are in addition to a sustainable and science-driven water management regime that appropriately allocates and prioritises environmental flows. Such best practice conservation measures broadly encompass four main areas of action:

1. Innovative water use measures
2. Demand management initiatives
3. Water efficiency standards
4. Provision of community information.<sup>170</sup>

The rivers in NSW, particularly inland (including those that flow through and around the ACT), have often highly variable and unpredictable flows. Changes to flow patterns can have significant ecological effects that may not be noticed for many years or even decades. Water management needs to be able to adapt, in real time, to natural and human-induced changes to maintain healthy rivers. Factors that may require allocations to be revised in the future include climate change and changes in catchment and land use practices, better scientific information about environmental flows and major water quality incidents (such as contamination, pesticide spill, algal blooms or saline intrusions).<sup>171</sup>

The EDO ACT recommends water allocation mechanisms such as entitlements and licences should incorporate adaptive management terms. Such an approach would allow for any future adjustments necessary due to improved ecological knowledge and the WRA ought to be amended accordingly at Parts 4 and 5.

Please contact the EDO <edoact@edo.org.au> should you wish to discuss any matter arising.

Yours sincerely

**Environmental Defender's Office (ACT) Inc**

**Camilla Taylor**

Executive Director and Principal Solicitor

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<sup>170</sup> EDO NSW report, above n 92, 13.

<sup>171</sup> EDO NSW report, above n 121, 8.