



Submission in response to the draft NSW Murray and Lower Darling Surface Water Resource Plan

prepared by

EDO NSW
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Introduction

Water resource plans under the Commonwealth *Water Act 2007* (which incorporate parts of the water sharing plans under the NSW *Water Management Act 2000*) will be critically important to delivering the environmental and other objectives of the *Water Act 2007* and *Basin Plan 2012* because they are the operational documents which actually govern the flows in the rivers of the Murray-Darling Basin.

If water resource plans do not comply with the *Basin Plan 2012*, including through appropriate linkages with other plans such as the relevant Long-Term Watering Plan, they will compromise the restoration of the health of the Basin which is the key objective of the *Basin Plan 2012*.

The analysis below identifies errors of law in the preparation of the draft *NSW Murray and Lower Darling Surface Water Resource Plan*, primarily centered on the Risk Assessment in Schedule D, which demonstrates failures to comply with sections 10.17 and 10.41 – 10.43 of the *Basin Plan 2012*. These provisions create important links between water resource plans and the environmental watering plan in Chapter 8 of the *Basin Plan 2012* which is given local effect through the relevant Long-Term Watering Plan.

The errors we have identified are so fundamental that we cannot recommend individual changes to the draft Water Resource Plan to achieve compliance with the *Basin Plan 2012*. We instead recommend that the second stage in the Risk Assessment (being the development of strategies to manage the identified risks) be re-done in a lawful way that complies with sections 10.17 and 10.43 of the *Basin Plan 2012* and that an updated draft Water Resource Plan and amendments to the Water Sharing Plans be developed on the basis of that process (and exhibited for further public comment).

WRP Section 1.3 Objectives and guiding principles

The draft *NSW Murray and Lower Darling Surface Water Resource Plan (SW8 Water Resource Plan Area)* (**draft WRP**) makes the claim (at page 4) that the outcomes and objectives of the *Basin Plan 2012* are refined for this part of NSW through the objectives stated in the three relevant draft Water Sharing Plans (**draft WSPs**)¹.

We do not believe that the objectives stated in the draft WSPs, which are incorporated by reference into the draft WRP, actually reflect the objectives of the *Basin Plan 2012* or the *Water Act 2007 (Cth)*, and in fact represent a significant reduction from the outcomes sought.

The key objectives set out in section 3 of the *Water Act 2007 (Cth)* include:

- 3(b): to give effect to relevant international agreements (including the Ramsar Convention in relation to wetlands of international importance); and
- 3(d): without limiting paragraph (b) or (c):
 - i. to ensure the return to environmentally sustainable levels of extraction for water resources that are overallocated or overused; and
 - ii. to **protect, restore** and provide for the ecological values and ecosystem services of the Murray-Darling Basin (taking into account, in particular, the impact that the taking of water has on the watercourses, lakes, wetlands, ground water and water-dependent ecosystems that are part of the Basin water resources and on associated biodiversity); and
 - iii. **subject to subparagraphs (i) and (ii)**—to maximise the net economic returns to the Australian community from the use and management of the Basin water resources.

These objectives cascade down into the requirements for the *Basin Plan 2012* listed in section 21 of the *Water Act 2007 (Cth)*:

- 1) The Basin Plan (including any environmental watering plan or water quality and salinity management plan included in the Basin Plan) must be prepared so as to provide for giving effect to relevant international agreements (to the extent to which those agreements are relevant to the use and management of the Basin water resources).
- 2) Without limiting subsection (1), the Basin Plan must:
 - a) be prepared having regard to:
 - i. the fact that the use of the Basin water resources has had, and is likely to have, significant adverse impacts on the conservation and sustainable use of biodiversity; and
 - ii. the fact that the Basin water resources require, as a result, **special measures to manage their use to conserve biodiversity**; and
 - b) promote sustainable use of the Basin water resources to protect and restore the ecosystems, natural habitats and species that are reliant on the Basin water resources and to conserve biodiversity.

¹ draft *Water Sharing Plan for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources 2020*, ss8(1) and 8(2)
Draft *Water Sharing Plan for the Lower Murray-Darling Unregulated River Water Source 2011 (proposed amendments 2020)*, ss8(1) and 8(2)
draft *Water Sharing Plan for the Murray Unregulated River Water Sources 2011 (amended 2020)*, ss10(1) and 10(2)

These objectives in the primary legislation make it clear that the objective of the *Basin Plan 2012* is to “protect and restore” Basin ecosystems.

These statutory requirements then cascade down into the more detailed environmental outcomes for the Basin set out in section 5.03 of the *Basin Plan 2012* which include ‘protecting and restoring’ water-dependent ecosystems and ecosystem function.

By contrast to these clear statutory objectives to both **protect and restore** the Basin’s natural environment, the draft WSPs use the language of “protect and, where possible, enhance” in relation to both their broad environmental objective and their targeted environmental objectives.

The language of ‘enhance’ in the WSPs is certainly a lower level of ambition than the language of the Act and the Basin Plan, which have the objective of ‘restoring’ ecosystems and ecological function.

The language of ‘where possible’ is more troubling, including because it misleadingly suggests that it may not be ‘possible’ to enhance the health of the water-dependent ecosystems and ecosystem functions of the Basin. There is no doubt that it is possible to enhance the ecological health and functioning of the Basin ecosystems. The barrier to this is the willingness of governments to set limits on the water being taken for consumptive use and to manage the flows of the rivers in a way that supports ecological functioning, both of which can be achieved with an appropriately drafted WSP.

This drafting is misleading, inconsistent with the objectives of both the Act and Basin Plan and appears designed to disguise the fact that any failures by these plans to enhance the ecological health of the Basin will be the result of a choice by government not to do so.

Key recommendation:

- ***The environmental objectives in all three WSPs be amended to reflect the objectives of the Water Act 2007 and Basin Plan to ‘protect and restore’ relevant ecosystems and ecosystem functions (and remove the language of ‘protect and where possible enhance’).***

WRP Section 1.3.1: Requirements of NSW Act

The draft WRP incorporates by reference a number of other documents, including parts of the three relevant Water Sharing Plans made under the state *Water Management Act 2000 (NSW)* (note that water sharing plans are referred to in the Act as “management plans”). The package of documents comprising the draft WRP includes amendments to the three existing WSPs.

Section 1.3.1 of the draft WRP states that the objectives of the WSPs “are guided by” a number of provisions of the *Water Management Act 2000 (NSW)*. This language suggests that the relevant provisions of the Act are in the nature of non-mandatory guidelines, rather than statutory requirements which must be complied with. This includes the express obligation in section 5(3) and 9 to prepare WSPs in a way that firstly ensures the needs of the environment are met, then ensures that basic landholder rights are met and then makes any remaining water available for sharing among other users.

Recommendation:

- ***Section 1.3.1 of the WRP be amended to acknowledge the mandatory rules for water sharing plans contained in, among other provisions, sections 5(3) and 9 of the NSW Water Management Act 2000***

Section 1.4: Relationship between WRP and other instruments

We commend the attempt in this section to visually represent some of the complex relationships between the various plans in effect under State and Commonwealth legislation. However, the resulting figure (Figure 1-1) is highly misleading to the extent that it suggests that there is only an indirect relationship between Long-term watering plans (**LTWPs**) and WRPs (and the WSPs which are incorporated into the WRPs).

To put this discussion in context, the plans relevant to environmental watering under the Commonwealth *Water Act 2007* are as follows:

- Section 22 of the Act provides that the mandatory content of the Basin Plan includes an environmental watering plan which complies with the content requirements of section 28;
- Chapter 8 of the *Basin Plan 2012* is the environmental watering plan (**EWP**) required by ss22 and 28 of the primary Act. The EWP sets the overall environmental objectives for the Basin Plan and provides for them to be given effect by a Basin-Wide Environmental Watering strategy² (**BWEWS**) (to be prepared by the MDBA) and Long-Term watering plans for each water resource area (to be prepared by the relevant state government);
- The BWEWS sets the high-level framework for environmental watering, including of regionally significant **priority environmental assets (PEAs)** and **priority ecosystem functions (PEFs)**³;
- Long-term watering plans are then prepared by the states for each WRP area to identify PEAs and PEFs for the area, the objectives and targets for the management of those PEAs and PEFs and – importantly – the **environmental watering requirements** for meeting those objectives⁴.

The key things to note about this cascade of plans are that:

- They are intended to coordinate the management of both Held Environmental Water (**HEW**) (ie. entitlements acquired by government to achieve the Sustainable Diversion Limits (**SDL**)) and Planned Environmental Water (**PEW**) (rules-based environmental water which is created by, and governed by, State water plans)⁵; and
- They set the detailed environmental objectives which need to be met in order to achieve the higher-level environmental objectives of the Act and the Basin Plan; and
- Given that WRPs are the key operational documents which establish PEW and control the management of the flow regimes of the rivers, WRPs are a key and essential tool for achieving the objectives of the LTWP, the EWP, the Basin Plan and the Act itself.

As a consequence, there are a number of provisions of the *Basin Plan 2012* (including sections 10.17 and 10.26)⁶ which require water resource plans to be consistent with and reflect the environmental watering plans, particularly the LTWP, and to address the **environmental watering requirements** of PEAs and PEFs.

We will return to this point in discussing subsequent sections of the WRP, however, it is clear that this mistaken interpretation of the role of LTWP has infected, and created legal error in, other provisions of the draft WRP.

² *Basin Plan 2012*, ss8.13 - 8.17

³ *Basin Plan 2012*, ss8.14-8.15

⁴ *Ibid* ss8.18 – 8.20

⁵ *Water Act 2007 (Cth)*, s28(1)(c)

⁶ see also *Basin Plan 2012*, s10.01(2)(e), 10.27, 10.41(2)(a)

Key recommendations:

- ***Figure 1-1 of the draft WRP should be amended to remove the misleading suggestion that the relationship between the LTWP and the WRP is indirect only.***
- ***A number of other provisions of the draft WRP will need to be amended to ensure that the LTWP and the broader Environmental Watering Plan are properly integrated into the WRP (this is discussed further below).***

WRP Section 3: Risks to water resources

This section of the draft WRP purports to address the requirements of sections 10.41 - 10.43 of the *Basin Plan 2012* which are about addressing risks to water resources primarily through a risk assessment.

In this section we discuss the obligations created by section 10.43 of the *Basin Plan 2012* and legal errors which are apparent on the face of the risk assessment which forms schedule D to the draft WRP (**Risk Assessment**).

Obligations under ss10.41 - 10.43: Risk assessment

The text of the Risk Assessment document demonstrates that the NSW Government has undertaken this process in a legally flawed way, including due to:

1. Misdirecting itself as to the law in terms of the decisions it was required to make under 10.43 of the Basin Plan (in that it gave itself an option for addressing risks which is not available under the *Basin Plan 2012*);
2. In the process of identifying strategies to address those risks it chose to address, it had regard to irrelevant considerations, failed to have regard to relevant considerations and misinterpreted provisions of both the *Basin Plan 2012* and the *Water Management Act 2000 (NSW)* which led it into further error.

Section 10.41 of the *Basin Plan 2012* provides that WRPs must be prepared having regard to current and future risks to the condition and continued availability of the water resource, including the risks to the capacity to meet **environmental watering requirements**. Each risk must be assessed as low, medium or high.

Section 10.43 goes on to require that, if a risk is assessed as medium or higher, then the WRP must either:

- (a) describe a strategy for the management of the water resources of the water resource plan area to address the risk in a manner commensurate with the level of risk; or
- (b) explain why the risk **cannot** be addressed by the water resource plan in a manner commensurate with the level of risk.

“Environmental watering requirements” is defined to mean the environmental watering requirements of a **priority environmental asset** or **priority ecosystem function**⁷. PEAs and PEFs (and their environmental watering requirements) are identified in the Basin-wide Environmental Watering Strategy⁸ and the relevant LTWP⁹.

The overall effect of these provisions is that, in preparing the WRP, the NSW Government must assess risks to the environmental watering requirements of the PEFs and PEAs identified in the LTWP and the BWEWS and, if those risks are medium or higher, then the draft WRP must either:

1. Include a strategy to manage the risk in a manner commensurate with the level of risk; or
2. Explain why the risk **cannot** be addressed in a manner commensurate with the level of risk.

Note that the language of this provision in relation to the second option is that the risk ‘cannot’ be addressed. That means that this assessment is about what is possible, not what a State government may decide is preferable, given its other priorities.

⁷ *Basin Plan 2012*, s1.07

⁸ *Basin Plan 2012*, 8.14(2)(a)(i)

⁹ *Basin Plan 2012*, s8.19

Section 10.43(3) provides that a WRP must be prepared having regard to the strategies to address or manage identified risks set out in section 4.03 of the *Basin Plan 2012*. These strategies will be relevant considerations for the state government in identifying strategies to address the risks it has identified in the process set out in section 10.43(1).

The formal content of the draft WRP includes the Risk Assessment in schedule D which addresses (or purports to address) both the risk assessment for section 10.41 and the strategies for addressing the identified risks for the purposes of section 10.43. The parts of the Risk Assessment which purport to comply with section 10.43 are section 8 and Table 1 (see s3.3 of the draft WRP).

The following sections outline the legal flaws we have identified in section 8 and Table 1 of the Risk Assessment.

Decisions available under s10.43

Section 8 of the Risk Assessment outlines the approach the NSW government has chosen to take to addressing the identified risks.

There are a number of legal flaws in the approach outlined in this section which appear to have flowed through to the rather concerning decisions outlined in other parts of the Risk Assessment.

The initial, and perhaps most significant, flaw is the approach outlined on page 207 in which the NSW Government purports to give itself a third option, beyond the two options to addressing risks which are legally available under s10.43(1). This third (unlawful) option is to define High or Medium risks as 'tolerable' and to therefore decide not to develop any strategy or mechanism to address the risk or explain why the risk can't be addressed¹⁰. ***This is not one of the options available under s10.43 of the Basin Plan 2012 and, in our view, is unlawful.***

Section 8.2 of the Risk Assessment further explains this (unlawful) approach by stating that:

*"There are a variety of reasons why medium or high risk results may be tolerable including **acceptance of the fundamental changes** that river regulation has made to some NSW rivers and the **balancing** of environmental, social, cultural and economic demands on water resources"*

Neither of these considerations are within the scope of lawful considerations available under the *Basin Plan 2012*. Any 'acceptance' of environmental degradation can only occur through the process of developing the EWP (and the BWEWS and LTWPs underneath it) - it is unlawful for the NSW Government to neglect the obligations it has under the *Basin Plan 2012* to address the environmental watering requirements and seek the environmental outcomes established in the higher order documents.

Secondly, the concept of 'balancing' environmental, social, cultural and economic demands is, once again, unlawful (particularly at this point in the process). The outcomes to be achieved have been established and it is not open to the NSW government to decide in a subsidiary document to its draft WRP to simply not attempt to achieve them or leave them at high risk of remaining unachieved.

¹⁰ see discussion below - the risks 'predefined' as tolerable include a significant number of the environmental watering requirements in the regulated part of the system.

8.2.2.1: precautionary principle

Section 8.2.2.1 of the Risk Assessment outlines deficiencies in the information available to assess the level of risk to the environment from water extraction and subsequent decisions to define each risk level as ‘tolerable’ and to recommend further monitoring.

This is exactly the type of situation where the precautionary principle should be applied and, given that the relevant risks are risks to environmental watering, the *Basin Plan 2012* would seem to suggest that the precautionary principle should have been applied¹¹.

8.3: Mistakes of law and irrelevant considerations in developing strategies to manage risks

Section 8.3 of the Risk Assessment outlines the approach taken to addressing risks for which mitigation is considered possible.

This section of the Risk Assessment goes on to state that there are a number of “*overarching principles which guide the development of WRPs*” in NSW and states that those principles have been considered in the development of new actions and mechanisms to address the risks. The “overarching principles” are identified in Table 8-4.

The ‘*overarching principles*’ identified in table 8-4 demonstrate that, in approaching the mitigation of risks, the NSW Government has:

- Failed to have regard to relevant considerations;
- Had regard to several irrelevant consideration; and
- Misdirected itself as to the law in its interpretation of both the *Basin Plan 2012* and the *Water Management Act 2000 (NSW)*.

Commonwealth Water Act

Table 8-4 of the Risk Assessment identifies the following as the relevant principles from the *Commonwealth Water Act 2007*:

- There will be no net reduction in the protection of Planned Environment Water;
- The Commonwealth is responsible for funding the gap between existing limits and the Sustainable Diversion Limits (SDL);
- WRPs will meet the requirements set out in the Basin Plan.

This list is not incorrect, as far as it goes (however, see discussion later of whether the level of protection of PEW has been reduced), though the second bullet point is largely irrelevant for the purposes of drafting a WRP.

However, the list fails to have regard to the objectives of the *Water Act 2007* and *Basin Plan 2012* which should be used to guide and interpret other obligations, in particular in undertaking the difficult task of preparing a WRP.

Basin Plan 2012

The sole principle identified as drawn from the *Basin Plan 2012* is:

“Nothing in the Basin Plan requires a change in the reliability of water allocations of a kind that would trigger Subdivision B of Division 4 of Part 2 of the Act (s. 6.14)”

¹¹ *Basin Plan 2012*, s8.38: *A lack of full scientific certainty as to whether there are threats of serious or irreversible environmental damage should not be used as a reason for postponing measures to prevent environmental degradation.*

This not only neglects to have regard to all of the objectives of the *Basin Plan 2012*, it also identifies a provision which has no current function and gives it an interpretation which is incorrect at law.

The NSW Government appears to have assumed that section 6.14 of the *Basin Plan 2012* means that it can't (or need not) alter any rules in WSPs which may affect the reliability of supply under Water Access Licences (**WALs**). This is wrong at law. When a WSP is made or amended or a WRP (incorporating a WSP) is made, it may well be appropriate to make new rules which affect the reliability of WALs if, for example, the previous rules were not achieving the outcomes required by the primary legislation.

Section 6.14 of the *Basin Plan 2012* must be read in the context of the relevant provisions of the Primary Act. Subdivision B of Division 4 of Part 2 of the *Water Act 2007 (Cth)* has the following general effect:

- It applies where there is a "change to the Basin Plan".¹² That means it doesn't apply to the original Basin Plan - only to subsequent changes. Section 6.14 merely has the effect of recording that there have not yet been any changes to the Basin Plan which trigger the operation of this subdivision.
- If a change to the Basin Plan results in a change to the reliability of a water allocation, then there may be a right to claim compensation if "*the change is reasonably attributable to the Commonwealth's share of the change in reliability*";¹³
- If the Basin Plan contains a relevant change, then it must specify the extent to which the changed reliability is attributable to changes in Commonwealth Government Policy (the '**Commonwealth Government Policy Component**') and the extent to which the changed reliability is "attributable to improvements in knowledge about the environmentally sustainable level of take for the water resources of the water resource plan area" (this is the '**new knowledge component**')¹⁴;
- The 'Commonwealth's share' of the change in reliability is then calculated using the method in the National Water Initiative and the Regulations (if any).¹⁵

The key points to be taken from these provisions are that:

- Neither the *Water Act 2007* nor the *Basin Plan 2012* (or indeed state laws) prevent WRPs (or WSPs) from changing the reliability of WALs - in fact some changes to reliability may be necessary to meet the requirements of the Basin Plan and the *Water Management Act 2000 (NSW)* through the ordinary application of good policy processes (given the outcomes of the current WSP);
- The Basin Plan has not been subject to a change which engages the operation of section 6.14. As a consequence, that section has no relevance to the current process; and
- The relevant provisions of the *Water Act 2007* are about allocating compensation risk between the States and the Commonwealth - they do not constrain the content of a WRP.

Overall this means that:

- To the extent that the NSW Government has assumed that, in preparing its WRP and addressing the risks identified in the risk assessment, it cannot lawfully change the reliability of WALs - it has erred at law;
- The assessment of how to respond to the identified risks must be undertaken anew on a lawful basis and without the assumption that reliability cannot be affected;

¹² see *Water Act 2007*, s80(2) and 81(1) and (2)

¹³ *ibid* s80(4)

¹⁴ *ibid* s81(3)

¹⁵ *ibid* s81(4)

- The assessment of how to respond to the identified risks should be undertaken having proper regard to the Objectives of the Basin Plan and the state's obligations under s10.43;
- If this error of law has infected the NSW Government's approach to other elements of the WRP and WSPs, they should similarly be revisited and drafted in accordance with the law.

We note that a similar approach appears to have been taken in Appendix D (which is the Prerequisite Policy Measures Procedures Manual) which asserts that Prerequisite Policy Measures will only be implemented to the extent that detrimental impacts on access rights of licence holders can be mitigated or offset.

Failure to consider relevant requirements of Basin Plan

The *Basin Plan 2012* expressly states in section 10.43(3) that the WRP must be prepared having regard to the strategies identified in section 4.03.

The strategies in section 4.03 are expressly relevant considerations in deciding how to respond to risks under s10.43(1). A failure to have regard to these considerations may result in the decision being held to be invalid.

While Table 1 of the Risk Assessment cites section 4.03 a number of times, there is no reference to its requirements in the decision-making process detailed in section 8. It appears to us that the Risk Assessment has failed to have adequate (or any) regard to the requirements of s10.43(3) and 4.03.

NSW Water Management Act

Table 8-4 of the Risk Assessment identifies the following as a principle of the *Water Management Act 2000 (NSW)*:

"WSPs are required to balance social, cultural, economic and environmental needs of the community and catchments (this is a fundamental objective of water management in NSW and is described in the objects of the Act)."

This is wrong at law. The *Water Management Act 2000 (NSW)* does not, in any sense, authorise or require the environmental health of the system to be traded-off for economic or social objectives in some sort of 'balancing' exercise - in fact quite the opposite.

Section 3 of the *Water Management Act 2000 (NSW)* includes environmental, economic and social Objectives, however, it does not require or authorise those Objectives to be weighted equally. When read in the context of the balance of the Act (which is a fundamental requirement of statutory interpretation), it is clear that the Act recognises that the environmental health of the system must be protected in order to achieve its social and economic objectives (this is a pragmatic recognition of, among other things, the fact that the agricultural productivity of Basin is dependent upon natural systems and processes which provide services vital to water quality and availability).

This can be seen particularly in sections 5(3) and 9 of the Act which place a duty on decision-makers under the Act to give effect to the following priority order in making decisions about water sharing:

1. sharing of water from a water source must protect the water source and its dependent ecosystems, and
2. sharing of water from a water source must protect basic landholder rights, and
3. sharing or extraction of water under any other right must not prejudice the principles set out in paragraphs (a) and (b).

These provisions make it clear that, in preparing a water sharing plan, both the volumes of water allowed to be taken and the flow regimes created must firstly protect the water source and its dependent ecosystems, then ensure that basic landholder rights can be satisfied. Only after that process has been undertaken can any remaining water be made available for sharing under a bulk access regime (ie. under WALs).

These prioritisation requirements have been considered by the Court of Appeal¹⁶ and, more recently by the Natural Resources Commission¹⁷.

The *Water Management Act 2000 (NSW)* does not require any system of 'balancing' environmental, economic and social needs. To the extent the NSW Government has assumed that it does in responding to identified risks, it has erred at law and the resulting decisions may be invalid.

Non-statutory considerations

Table 8-4 of the Risk Assessment also identifies the following principles from a document called 'Delivering WRP Plans for NSW Roadmap 2016-2019':

- *"WRPs are cost neutral for NSW licence holders"*
- *"Development of WRPs minimises change to NSW WSPs within their initial ten year terms"*

These are not considerations which are relevant under the framework of either the *Water Act 2007 (Cth)* or the *Water Management Act 2000 (NSW)*.

While it may be lawful for the NSW Government to use these concepts as guidance in choosing between options which have been developed in a lawful way (ie. in accordance with s10.43 of the Basin Plan and having regard to relevant considerations only), they cannot be primary considerations and certainly can't be used to avoid taking steps required by the statutory framework or to override other obligations under the primary legislation.

The extent to which these irrelevant considerations have infected decisions on how to address identified risks is not clear, however, there is at least one example in the Risk Assessment document of a decision not to address a risk on the basis of avoiding changes to a WSP in its initial 10 years of operation. That example is on page 40 of the Risk Assessment which explains that the risk to the base flows needed to meet environmental watering requirements in the Albury region will not be addressed for the reason that:

"These risk results cannot be addressed during WRP development as NSW planning principles minimise change for WSPs within their initial ten year period to provide certainty for water users."

This example is expressly contrary to the requirements of section 10.43 of the *Basin Plan 2012* and is unlawful.

Key recommendations:

- ***The decisions under section 10.43 of the Basin Plan, as outlined in the Risk Assessment, must be put aside and decisions about how to respond to each risk must be re-made in a way that accords with s10.43(1) and (3) of the Basin Plan***

¹⁶ *Tubbo Pty Ltd v Minister Administering the Water Management Act 2000; Harvey v Minister Administering the Water Management Act 2000* [2008] NSWCA 356 per Spigelman CJ at [31]

¹⁷ see section 4.1 of *Natural Resources Commission, 2019, Final Report: Review of the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012*

Specific decisions in risk assessment - environmental watering requirements

As outlined above, the decisions available to the NSW Government under s10.43(1) in deciding how to address the identified risks categorised as medium or high are to:

- a. describe a strategy for the management of the water resources of the water resource plan area to address the risk in a manner commensurate with the level of risk; or
- b. explain why the risk cannot be addressed by the water resource plan in a manner commensurate with the level of risk.

The NSW government's other obligations in relation to environmental watering are to have regard to *"whether it is necessary for it to include rules which ensure that the operation of the plan does not compromise the meeting of environmental watering requirements of priority environmental assets and priority ecosystem functions"*¹⁸. If the outcome of that assessment is that such rules are necessary, they **must** be included in the WRP¹⁹ (s10.17(3)). We return to this point in more detail later in our submission, however, it is relevant to the way in which the Risk Assessment has responded to (or, more accurately failed to respond to) the risks to environmental watering requirements.

The following table summarises the outcomes for risks which were given an initial risk rating of High in Table 1 of the Risk Assessment in relation to three categories of risks, being:

- risks to environmental watering requirements;
- risk to delivery of water for the environment from climate change; and
- risk to other water uses from climate change.

In order to understand this analysis, it is important to understand the following points about how the Risk Assessment has approached addressing risks:

1. As discussed above, section 8.2.1 outlines that an approach under which the NSW Government as 'pre-defined' certain risks as 'tolerable'. As outlined above, we do not believe that this is lawful. The risks which have been pre-defined as tolerable primarily relate to a **choice** made not to attempt to meet certain environmental watering requirements in the regulated system - on the basis that ecologically significant flows would require modification of the way in which water is currently released from dams to meet orders from (primarily irrigation) users.
2. The vast majority of the risks given an initial risk rating of High have remained high risk following the application of the new strategies or mechanisms, however, the Risk Assessment has in many cases purported to accept the continuing high risk as 'tolerable'. In some cases there appears to be some argument presented that it is not possible to mitigate the risk for the purposes of section 10.43(1)(b), however, the justifications presented are quite minimal. For the remaining High Risks, it is not entirely clear what the statutory basis is for this finding, however, it seems unlikely to us that a failure to reduce the risk category could constitute a strategy to manage the risk commensurate with its risk rating for the purposes of section 10.43(1)(a).

¹⁸ *Basin Plan 2012*, s10.17(1)

¹⁹ *Ibid* s10.17(3)

Category of Risk	Total risks with initial rating of High (“High Risks”)	Total High Risks pre-determined as ‘tolerable’	Total High Risks with unchanged risk rating following new mechanisms or strategies	Total Number of High Risks mitigated
Risks to water available for the environment and ability to meet environmental watering requirements (section 4.3 RA)	69	20	48	1 (note that this risk appears to have been judged not to be a risk rather than actually mitigated)
Risks for water available for the environment due to climate change (section 4.6 RA)	8		8	0
Risks to water available for other uses due to climate change (section 7.3 RA)	1		1	0
Total	78	20	57	1 (arguably)

Of the 78 risks initially categorised as ‘High Risks’ across the three areas above, only one risk changed category. However, that risk was not actually mitigated; it was instead judged to not be ‘considered an actual risk’²⁰. As a consequence, on our analysis of Table 1 of the Risk Assessment **none of the risks initially placed in the High Risk category were successfully mitigated.**

The results for Medium Risks are not dissimilar:

- In relation to risks from climate change to environmental watering (s4.6 of the Risk Assessment), the two Medium Risks did not change to a different risk category (note that there were no Low Risks for this issue);
- In relation to risks from climate change to other uses (section 7.6 of the Risk Assessment), each of the seven risks assessed to be Medium Risks remained in that category (only three risks were assessed as Low);
- In relation to risks to water available to meet environmental watering requirements (s4.3 of the Risk Assessment) a large number of risks assessed as Medium remained unmitigated on the basis that:
 - they were pre-determined to be ‘tolerable’ risks;
 - the risk rating did not change following mitigation strategies; or
 - the ‘ability to mitigate is low and hence the risk was tolerable’.

²⁰ see page 5 of the Risk Assessment

Key recommendations:

- ***The process under s10.43 of the Basin Plan must be re-done lawfully to produce strategies which will ensure that the risks to environmental watering requirements and risks from climate change are mitigated to the 'Low' category, unless the risk cannot be mitigated.***
- ***Consequential changes to the WRP and WSPs must be made.***

WRP section 3.3: Strategies to address climate change related risks and risks to environmental watering requirements

Table 3-1 in section 3.3 of the draft WRP contains a list of strategies to address risks (noting, from the discussion above, that these strategies do not appear to be effective in addressing the identified risks, at least in relation to High and Medium Risks).

While table 3-1 of the draft WRP appears at first to be quite a comprehensive list of strategies, when viewed in the context of the outcomes of the strategies discussed above and the actions which make up each strategy, it is clear that ***the strategies to protect environmental water and to address climate risk are inadequate, ineffective or, in most cases, both.***

In order to understand the actions which make up each of the strategies listed in Table 3-1 it is necessary to go to table 8-7 of the Risk Assessment.

Strategy 3: Discretionary environmental watering events

Strategy 3 in table 3-1 of the draft WRP is to:

“Provide discretionary environmental watering events in the regulated river and downstream unregulated river (Darling Anabranches) sections of the WRP area.”

Table 8-7 of the Risk Assessment indicates that the discretionary environmental watering events are to be drawn from the Barmah-Millewa Allowance (BMA), Barmah-Millewa Overdraw (BMO), Murray Additional Environmental Allowance (Murray AEA), or the Lower Darling Environmental Water Allowance (each of which is defined in the relevant WSP).

While some element of discretion should be available to deploy environmental water in emerging situations, there is a significant risk that an allocation of environmental water will never be used if the extent of discretion available is too high. For example, page 97 of the draft LTWP identifies that two existing environmental water allowances (the Barmah-Millewa Overdraw and the Lower Darling Allowance) have never been used.

An examination of Table 1 of the Risk Assessment would also appear to indicate that the strategy of using this water is ineffective to alter the risk category of High and Medium risks to environmental watering requirements.

Strategy 4: Flow targets from LTWP

Strategy 4 in table 3-1 of the draft WRP is to:

“Manage environmental water to meet flow targets specified in the NSW Murray and Lower Darling LTWP”

The actions and mechanisms (outlined on page 221 and 222 of the Risk Assessment) which comprise this strategy don't appear to include any new actions above the environmental water allowances in the WSPs and actions NSW is already obliged to deliver under the *Water Act 2007* (ie. pre-requisite policy measures and relaxation of constraints) (the meaning of mechanism E8 is, however, somewhat unclear).

Further:

- This strategy is misleading to the extent that there has been a positive decision not to attempt to achieve a number of the flow targets in the regulated system derived from the LTWP (as outlined in table 8-3 of the Risk Assessment) as the risks have been pre-defined as tolerable; and
- Table 1 of the Risk Assessment suggests that the actions making up this strategy are unlikely to be effective in actually delivering many of the flow targets identified in the LTWP.

Strategy 14: Climate change

This strategy is identified in table 3-1 of the draft WRP as:

“Protect the environment and water users from the changes in flow attributable to climate change”

The actions and mechanisms which make up this strategy are:

- E1: Reserve all water above the long-term average annual extraction limit (**LTADEL**) for the environment as PEW (defined and managed by the listed WSPs).
- E2: Available Water Determinations (**AWD**) adjust extractive use according to water availability.
- E3: Sustainable Diversion Limits.

The LTADEL (which essentially allocates water to the environment above a defined extraction limit) is an existing approach based on the average of *historical* extractions and not a strategy for addressing the risks of lower water availability and a hotter, drier climate under climate change affected conditions. It is also a misleading indicator of the amount of water actually available for the environment, in that it is an average of many years. This has the result that the large amounts of water available in flood years disguise the fact that inadequate amounts of water may be available in normal and dry years²¹.

Available Water Determinations are an existing tool under which licence holders are given access to a proportion of the nominal volume or shares available under their licence, depending upon the relative availability of water in the particular year. It is an existing mechanism used to address climate *variability*; it is not a mechanism to address the long-term changes we can expect to experience as a result of climate change.

The Sustainable Diversion Limit under the Commonwealth *Water Act 2007* was expressly based on the historical record and does not incorporate climate change impacts²². It is not a tool which addresses climate change risk.

²¹ see discussion on page 4 of: *Natural Resources Commission, 2019, Final Report: Review of the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012*

²² see Young WJ, Bond N, Brookes J, Gawne B & Jones GJ, 2011, Science Review of the estimation of an environmentally sustainable level of take for the Murray-Darling Basin: Final report to the Murray-Darling Basin Authority, CSIRO:

As a consequence, the discussion above of the failure of this strategy to effectively mitigate climate change related risks is perhaps unsurprising.

The inclusion of this strategy in the WRP is misleading in that it suggests that there are mechanisms in place to address climate change risks, when clearly there are not.

Key recommendations:

- ***All risk mitigation strategies need to be re-visited and new mechanisms developed which actually address and mitigate the identified risks.***

“MDBA has modelled the likely impacts of climate change to 2030 on water availability and this modelling is robust. MDBA has not used this information in the determination of SDLs for the proposed Basin Plan but rather has determined SDLs using only the historical climate and inflow sequences.”

WRP Section 4: Environmental water

WRP s4.2 and 4.3: PEAs and PEFs

This section of the draft WRP purports to respond to section 10.17 of the *Basin Plan 2012*. As outlined above, this is a key section because it ensures that the high level Objectives of the *Water Act 2007* in relation to restoring the ecological health of the system (which are fleshed out in the EWS and LTWPs) are integrated into WRPs (as the operational documents which actually govern the flows in the rivers).

A failure to comply with this requirement could seriously compromise capacity to achieve the overall Objectives of the *Water Act 2007*.

Section 10.17 requires the NSW government, in preparing the WRP, to have regard to:

“whether it is necessary for it to include rules which ensure that the operation of the plan does not compromise the meeting of environmental watering requirements of priority environmental assets and priority ecosystem functions”²³

If the outcome of that assessment is that such rules are necessary, they **must** be included in the WRP (s10.17(3)).

As discussed above, PEAs and PEFs, and their respective environmental watering requirements, are defined in the BWEWS and LTWPs.

The draft WRP does not contain a document which sets out a separate assessment addressing section 10.17. The draft WRP instead refers to the Risk Assessment as the document which addresses this obligation.

In the Risk Assessment:

- section 8.2.1 outlines a positive decision not to attempt to meet the environmental flow requirements in the regulated system;
- Section 4.3 discusses risks to the environmental watering requirements identified in the LTWP, with tables 4-12 to 4-14 identifying the risks to achieving environmental watering requirements in the regulated system, Menindee Lakes and the unregulated system;
- Table 1 of the Risk Assessment (discussed above) shows any changes to the extent of these risks following the application of strategies to mitigate risk (as discussed above, there is almost no change in the risk ratings for High and Medium risks of failing to meet environmental flow requirements).

The Risk Assessment is probably adequate to comply with the first step of section 10.17 (that being to assess whether it is necessary to include rules which ensure that the operation of the plan does not compromise meeting EWRs).

However, we do not believe that the second step of section 10.17 has been complied with. In our view, the High and Medium risk ratings across many of the flow classes identified in the LTWP strongly suggest that rules are required to avoid compromising environmental watering requirements. That means the NSW Government is under an express obligation under s10.17(3) to include rules to avoid compromising environmental watering requirements.

²³ *Basin Plan 2012*, s10.17(1)

The decision outlined in section 8.2.1 not to attempt to achieve certain environmental watering requirements in the regulated system is, in our view, an express breach of the requirements of section 10.17(3).

It is further our view that the failure to mitigate many of the risks to achieving EWRs is similarly a breach of section 10.17(3).

Key recommendations:

- ***The WRP does not comply with section 10.17. The draft WRP and WSPs must be amended to include rules to avoid compromising environmental watering requirements.***

WRP s4.5 and Appendix C: No net reduction in the protection of PEW

Section 21(5) of the *Water Act 2007 (Cth)* provides as follows:

“The Basin Plan must ensure that there is no net reduction in the protection of planned environmental water from the protection provided for under the State water management law of a Basin State immediately before the Basin Plan first takes effect.”

This is reflected in the requirements for WRPs in section 10.28 of the *Basin Plan 2012*:

“A water resource plan must ensure that there is no net reduction in the protection of planned environmental water from the protection provided for under State water management law immediately before the commencement of the Basin Plan.”

The key points to note about this obligation are:

- The scope of what is meant by the ‘level of protection’ for PEW is not entirely clear, however, in our view it is likely to extend beyond the simple volume of water available to the environment to also include other environmentally significant characteristics of the water such as timing and ability to produce ecologically significant flows (eg. protection of the low flows which are critically important to maintaining connectivity and water quality in dry times);
- This is a ***minimum*** requirement only. It may well be the case that compliance with other requirements of the *Basin Plan 2012* (as discussed above) or compliance with the requirements of the *Water Management Act 2000 (NSW)* (in particular section 5(3) and 9, as discussed above) will dictate that (having regard to the outcomes of the protections available under the previous versions of the WSPs) additional or different protections for, and/or additional volumes of, PEW may be required.

This draft WRP purports to address this requirement in section 4.5 which:

- States that *“the rules and arrangements for planned environmental water in section 4.1.1 of this WRP are essentially the same as the rules in place immediately before the commencement of the Basin Plan”*. (ie. the NSW Government has elected to comply with the minimum requirement only); and
- States that the report in Appendix C demonstrates that there has been no net reduction in the protection of PEW.

There are two key issues with the NSW Government's approach to this issue:

- I. Under this approach the NSW Government has delivered the minimum requirements of the s10.28 of Basin Plan only; and
- II. The basis upon which it is claimed that there has been no net reduction in the protection of PEW is an assessment against the LTAAEL and the SDL which, it is contended in the report, have the result that "*over the long term the overall volume of PEW is not reduced*". This is a flawed approach firstly because it assumed, wrongly in our view, that protection of PEW refers only to volume (when there are many other important characteristics of PEW which require protection) and secondly because this approach misleadingly averages the availability of PEW over several years to produce an answer which says nothing about the availability of PEW in dry years and may cause the abundance of water available in flood years to disguise inadequate environmental water availability in normal to dry years.

Recommendation:

- **The analysis of whether the draft WRP maintains at least the same level of protection for PEW should extend beyond the LTAAEL to incorporate other ecologically significant criteria including availability of water in dry years and ability to provide ecologically important flows;**
- **The amendments to the WSPs should be informed by an assessment of the adequacy of PEW to ensure that the WSPs comply with section 5(3) of the *Water Management Act 2000*.**

WRP s7: Measuring and Monitoring

Section 10.46 of the *Basin Plan 2012* provides that a water resource plan must specify the monitoring of the water resources in area that will be done to enable the Basin State to fulfil its reporting obligations under section 13.14.

This obligation is addressed in section 7 of the draft WRP and schedule J (the “MER plan”).

Given that the Basin Plan has been explicitly prepared on an adaptive management basis²⁴, monitoring and evaluation of the outcomes of the Basin Plan is critically important, as is the link between WRPs and the monitoring and evaluation framework in Chapter 13 of the *Basin Plan 2012*.

While we can't comment on the adequacy of MER plan, we do note that it contains the following troubling text:

“Please note that implementation of any MER program is dependent on having a defined, long-term budget. Given WSPs span a ten-year period, and LTWPs aim for a 10 to 20-year life-span it is likely that budgets and priorities will change during this time. While effort will be made to maintain a MER program and report on environmental outcomes every five years, the ability to implement all aspects of this plan may be limited in future years.”

This appears to be a suggestion from the NSW Government that it may cease to comply with its obligations under s10.46 and Chapter 13 of the *Basin Plan 2012* in future years.

Key recommendation:

- ***The NSW Government must commit to the long term funding of a thorough and appropriate monitoring program for each WRP area.***

²⁴ *Basin Plan 2012*, ss5.02, 8.02, 8.40 and 13.04(4)