

7 August 2019

Natural Resources Commission
GPO Box 5341
Sydney NSW 2001

By email: nrc@nrc.nsw.gov.au

Dear Commissioner

Re: 'Ecosystem in crisis' – draft report on the Barwon-Darling water sharing plan

Thank you for the opportunity to respond to the Natural Resources Commission's draft report on the *Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012*.

We commend the Commission on its thorough consideration of this water sharing plan and on the detailed recommendations for its improvement. We particularly commend the Commission for its recommendations around improving the rule-based protections for environmental watering and flow management in the plan to accord with the requirements of the water sharing principles in section 5(3) of the *Water Management Act 2000 (NSW)*.

This submission addresses:

- Recommendations that are applicable to other water sharing plans;
- The approach to A Class licences;
- Implementation of the Commission's recommendations;
- A broader role for the Commission.

Recommendations applicable to other water sharing plans

1. While many of the recommendations and findings of the draft report are specific to the Barwon-Darling, others have broader application to other water sharing plans across the Basin and even across the state. There is likely to be value in a broader review to determine whether these are systemic deficiencies present in other water sharing plans.
2. Issues with broader application potentially include:
 - (1) The need for water sharing plans to implement the water management principles of the Act, in particular the prioritisation required by the water sharing principle set out in section 5(3) of the Act. This is reflected in the recommendation to redesign this water sharing plan starting with the priorities for water sharing specified in the Act (**recommendation 2**).
 - (2). That principle is critically important because its proper

implementation should ensure that the broader public interest in the long term health of the system is not eroded by short term private interests. It is very unlikely that the Barwon-Darling is the only water sharing plan to neglect this principle;

- (2) The need for improvements to the evaluation framework for the plan through clearly linked objectives, outcomes and performance indicators that are specific, measurable and time-bound (**recommendation 4**). Each water sharing plan in the state should contain a clear statement of the outcomes it is attempting to achieve and should be supported by monitoring and reporting which clearly communicates to the community whether the plan is achieving its objectives. The Barwon-Darling water sharing plan is not the only water sharing plan deficient in this respect.
 - (3) Similarly, inadequate monitoring to report against environmental and social performance indicators (**recommendation 5(c)**) is unlikely to be limited to the Barwon-Darling;
 - (4) The need to transparently model the impacts of climate change and to review and revise water sharing plans based on that modelling should be a core component of all plans (**recommendation 16**);
 - (5) The need to protect held environmental water throughout the Basin (on the basis that this water would not historically have been available) (**recommendation 12**) is similarly relevant to all other plans in the Murray-Darling Basin;
 - (6) **Recommendation G** in relation to integrated catchment actions is also very likely to be applicable across broader areas and could possibly be expanded to include a review of whether land use planning under the *Environmental Planning and Assessment Act 1979* is acting synergistically with, or undermining, water sharing plans and the health of our water resources.
3. The Commission does not have the power under the *Water Management Act 2000* to initiate a broader review of water sharing plans in relation to systemic issues. However, the Minister could direct the Commission to undertake such reviews under s13 of the *Natural Resources Commission Act 2003*. We **recommend** that the draft report be updated to include a recommendation that the Commission be directed to undertake a review to determine whether the issues outlined above are systemic issues present in other water sharing plans.

A class licences

4. We support the federal government's commitment to 'seek to secure' A class licences¹. However, to date there has been no indication of how or when that process will occur or how comprehensive it will be.
5. The number of currently unused A class licences identified in the draft report highlights the need firstly, to implement rule changes to dramatically reduce the impact of extraction under any A class licences (as the Commission has recommended) and secondly, for the State government to be open to a compulsory process under s79 of the *Water Management Act 2000 (NSW)*.
6. While governments have been reluctant to undertake compulsory acquisition of water rights, we think that the special circumstances of the Barwon-

¹ <https://minister.agriculture.gov.au/littleproud/media-releases/vertessy-report>

Darling and the relationship between these licences and the recent fish kills (and the less observable, but equally devastating, kill of invertebrates documented in the draft report) could justify a departure from that position.

7. We **recommend** that the draft report be amended to include consideration of the potential for compulsory acquisition of A class licences in recommendation 11.

Implementation of the Commission's recommendations should be audited and publicly reported on

8. The draft report includes detailed recommendations for amendments to the water sharing plan to be made both immediately and when the plan is remade in 2023. Water sharing plans are highly technical documents with the result that, in many cases, it will be difficult for the community to properly assess whether, and to what extent, the Commission's recommendations have been implemented.
9. In that regard, we **recommend** that the draft report be updated to include a recommendation that a peer review (by the Commission or an independent consultant) be undertaken, and publicly released, to assess the extent to which the Commission's recommendations have been implemented both when a draft water resource plan and associated water sharing plan amendments are released later this year and again when the plan is remade in 2023.
10. While we acknowledge that the Minister is not bound by the Commission's recommendations, any decision to depart from, or not fully implement, those recommendations should be part of an informed public debate.

A broader role for the Commission

11. This process serves to demonstrate the importance of an independent body with an oversight role and a mandate to establish a sound evidence basis for properly informed natural resource management², particularly in the water space where the competing interests in highly interconnected resources will become more acute as the impacts of climate change increase.
12. We also think that this process, in light of the history and consequences of this particular water sharing plan, suggests that the Basin community may be better served by expanding the Commission's role, beyond that under s43 - 44 of the *Water Management Act 2000*, to also include peer review of water sharing plans before they come into effect.
13. As the Commission's draft report, and a number of other recent reviews (including the Matthews review³) have highlighted, public trust in government's ability to administer natural resources in the community's long term interest is low and needs to be rebuilt.
14. Amendments to ss41 and 50 of the *Water Management Act 2000 (NSW)* to require the Minister to consider a peer review of the draft water sharing plan before it is finalised would improve decision-making at the vital plan-making stage. The publication of such a review prior to the plan being made, and the publication of written reasons for any departure from its recommendations,

² *Natural Resource Commission Act 2003*, section 3

³ See: <https://www.industry.nsw.gov.au/about/our-business/independent-review-water-management-and-compliance>

- would also help the community to hold decision-makers to account if draft plans would be unlawful, inequitable or create poor environmental outcomes.
15. In the absence of the legislative amendments required to put this process into practice, the Minister could direct the Commission to perform this function under s13 of the *Natural Resources Commission Act 2003*.
 16. Water sharing plans are highly technical documents, which means that it is very difficult for the public to assess the potential impacts and actual consequences of a draft plan. Further, a water sharing plan cannot be challenged except through judicial review proceedings commenced within three months of the commencement of the plan⁴. As a consequence, by the time the effects of a new plan are being felt by the community, the option of legal challenge is no longer available.
 17. A publicly available assessment by a trusted independent voice could go a considerable way to helping the public to have their interests better represented at an appropriate time in the plan-making process.
 18. The implementation of the recommendations of the Matthews review have gone some way to addressing the public's loss of faith in the government's ability to carry out enforcement functions under the Act. A more active role for the Commission would similarly improve the water planning stage, ensure the legislation is implemented correctly and restore community confidence.

Conclusion

In summary, we **recommend** that the final report:

- A. Include a recommendation that the Commission be directed to undertake a review of other water sharing plans to determine the extent to which certain deficiencies in the Barwon-Darling water sharing plan are systemic issues⁵;
- B. Include an expanded recommendation G which includes consideration of whether land use planning under the *Environmental Planning and Assessment Act 1979* could act more synergistically with water planning to contribute to the health of our water resources;
- C. Include the potential for compulsory acquisition of A class licences in recommendation 11;
- D. Include a recommendation that a peer review by the Commission (or another independent person) be undertaken to assess the extent of implementation of the Commission's recommendations both when a draft water resource plan and associated water sharing plan amendments are released later this year and again when the water sharing plan is remade in 2023.

We also believe that providing the Commission with an oversight role in relation to plan making functions under the *Water Management Act 2000* would be a significant step towards restoring public trust in the government's ability to administer natural resources lawfully and in the long term interest of the whole Basin community. While changes to the *Water Management Act 2000* would be required to implement this for the longer term, there is certainly capacity for the Minister to direct the Commission under s13 of its own Act to start playing that role now.

⁴ *Water Management Act 2000 (NSW)*, s47

⁵ While the Commission has a statutory role in reviewing individual water sharing plans at identified points in their life, it does not have an existing mandate to conduct more systemic reviews.

For further information on these recommendations, please contact me on (02) 9262 6989 or deborah.brennan@edonsw.org.au.

Yours sincerely

EDO NSW

A handwritten signature in blue ink, appearing to read 'Deborah Brennan', written in a cursive style.

Deborah Brennan

Senior Policy & Law Reform Solicitor

