



Environmental Defenders Office

1 February 2021

Submitted by email: water.relations@dpie.nsw.gov.au

Dear Sir/Madam,

Public consultation: water market information platforms in NSW

The Environmental Defenders Office (**EDO**) welcomes the opportunity to provide the NSW Government with some brief comments on the state's water market information platforms. Our comments – which cover ten broad areas – are made in light of our role as public interest environmental lawyers representing a diverse client base (farmers, First Nations peoples, scientists, conservation groups, community groups) concerned about water management issues in NSW and beyond.¹

It is in this capacity that we frequently access the NSW Water Register, the WAL Register, Environmental Water Register and WaterInsights portal (and at times the information dashboards). We also have experience accessing comparable registers and databases in other Australian jurisdictions on behalf of our clients.

We therefore have a good understanding of the advantages and disadvantages associated with the suite of registers and platforms available in NSW, how they compare to those available in other states and territories, and the possible benefits associated with the addition of certain features to the NSW Water Register and WaterInsights portal in particular.

By way of general comment, a user-friendly, transparent system ought to be as centralised as possible, avoiding the need to proactively search across multiple platforms and websites for information that may or may not exist. We therefore appreciate the efforts of the NSW Government to consolidate information across the aforementioned registers, portals and dashboards. However, we believe that the inclusion of some additional features to some of these sites would enhance their usability, improve transparency and further consolidate important, water-related information.

More specifically, we wish to offer comments and recommendations across the following ten areas:

¹ The EDO is now a national organisation. We accordingly advise on water matters in all Australian jurisdictions.

1. Addition of ownership details to NSW Water Register

After careful analysis and discussion with a variety of experts and clients, the EDO is in favour of including ownership details for each water access licence (**WAL**) in the NSW Water Register, which is free and publicly available. This is based on the following eight elements:

- a) Consistency with the overarching legal framework within which WALs operate in NSW, namely the *Water Management Act 2000* (NSW) (**WM Act**). More particularly, water is a shared resource vested in the Crown², while the ‘water sharing principles’³ and associated duties include a mandatory obligation to prioritise ecosystem protection (that is, the commons) above private interests.⁴
- b) Ownership of (valuable) shares in a common and diminishing resource upon which ecosystems and current and future generations depend for their survival is a privilege and one that comes with a high level of responsibility and accountability to broader society. Accountability begins with transparency.
- c) Further to b, the links between transparency, public participation and trust in water management processes (which can in turn foster cooperation between stakeholders) are well-established.⁵
- d) Ownership details for every WAL in NSW can in fact be accessed via the WAL Register, for a fee. That is, the information is publicly available but in practice can only be obtained by those who have the resources to do so. This is *prima facie* iniquitous and creates information asymmetry, which is anathema to good water governance and trust (as per c, above).
- e) Further to d, privacy laws do not apply to information contained in the WAL Register.⁶ There is no logical reason not to extend this exemption to the NSW Water Register. Furthermore, privacy laws do not apply in any circumstances to corporate entities, government entities or trusts (all of which own WALs in NSW).⁷
- f) There is precedent for the publication of this information in other Australian jurisdictions. Specifically, full ownership details for water licences are included in the official, publicly available water registers in Western Australia⁸ and the Northern Territory.⁹ The Western Australian register also includes the addresses of licence holders.

² WM Act, s. 392(1), (2).

³ WM Act, s. 5(3). We note the use of the word ‘must’ as opposed to ‘should’ in this particular subsection.

⁴ WM Act, ss. 5(3), 9(1).

⁵ See for example: United Nations Environment Program (UNEP), *Environmental Rule of Law: First Global Report*, 2019, p. 15.

⁶ *Privacy and Personal Information Protection Regulation 2019*, cl. 7(i). This section exempts the WAL Register from Part 6 of the *Privacy and Personal Information Act 1998*.

⁷ Privacy laws are designed to protect the ‘personal information’ of individuals. See *Privacy and Personal Information Protection Act 1998* (NSW).

⁸ <https://maps.water.wa.gov.au/#/webmap/register> (accessed 29 January 2021).

⁹ <https://nt.gov.au/environment/water/water-licences/approved-water-extraction-licences> (accessed 29 January 2021).

- g) Publication of ownership details – combined with categorisation of all owners – will remove the need for speculation regarding a range of matters including trends in water ownership over time (i.e. the percentage of institutional investors/corporate agricultural investors/family farmers/mining companies and so on investing in water markets in a given water sharing plan (**WSP**) area).
- h) The absence of any probing, rigorous evidence that publishing ownership details for each WAL will harm the commercial interests of WAL holders (noting that water market gouging can occur in the absence of this information being publicly available and ought to be rendered unlawful in any case, as per the anti-market manipulations provisions in the *Corporations Act 2001* (Cth)).¹⁰

2. Publication of aggregate data for categories of owners in NSW Water Register

The EDO further supports the publication of aggregate data for categories of owners for each WAL class in each WSP area and within that area, each water source. Categories could include (for example) corporate agriculture; institutional investor; mining; government (environment);¹¹ government (other); family farmer; and so on.

3. Addition of a WSP search feature in NSW Water Register

It is not currently possible to search for WALs in an entire WSP area. Rather, it is necessary to search via the WAL number, water source (which is a subset of a given WSP area) or Lot/DP.

We believe that the addition of a WSP search feature would improve the register's usability. Ideally, the feature would allow a user to search for WALs across the entire WSP area or within each discrete water source contained in that area (i.e. would identify the water sources located in each water sharing plan area to avoid having to search for this information in the WSP itself, which is cumbersome).

4. Publication of dealings applications in NSW Water Register

We strongly support greater transparency with respect to dealings applications requiring ministerial approval under the WM Act. This would require the addition of another feature to the NSW Water Register specifying each dealing application under consideration and sufficient details to determine whether the dealing is likely to comply with the regulatory framework. This goes to the justiciability of the applicable law (that is, the public must be aware that a decision is under consideration and then

¹⁰ *Corporations Act 2001*, s. 1041A. The High Court has defined market manipulation as 'conduct, intentionally engaged in, which resulted in a price which does not reflect the forces of genuine supply and demand.' See: *Director of Public Prosecutions (Cth) v JM [2013] HCA 30* at 70. The Court has further defined 'genuine supply and demand' as 'those forces which are created in a market by buyers whose purpose is to acquire at the lowest available price and sellers whose purpose is to sell at the highest realisable price.' See *Director of Public Prosecutions (Cth) v JM [2013] HCA 30* at 71.

¹¹ We note that this information is currently available in the Environmental Water Register.

has been made if it is to exercise its right to seek judicial review of an allegedly unlawful approval).¹²

This is particularly important in relation to dealings applications for mining developments. These developments are often highly controversial and invariably have a significant impact on the surrounding environment (including, at times, on water resources).¹³ Consequently, complete transparency is required to ensure all affected parties can meaningfully scrutinise the application(s) and decision(s) in question.

5. Publication of controlled allocation orders in WaterInsights portal

We further support the inclusion of a feature for controlled allocation orders in the WaterInsights portal. While this information is currently published in the NSW Government Gazette and on the DPIE website, it could be easily overlooked by members of the public. In making this comment, we note that there was a controlled allocation order for specified groundwater sources in 2020.¹⁴ The order has largely escaped public scrutiny – as has the fact that at least one proposed mining operation (that is strongly opposed by local farmers and Traditional Owners) has formally sought water pursuant to the allocation order.

6. Publication of other official water-related decisions and announcements in WaterInsights portal

Orders, regulations and a variety of other notifications regarding water are published in the NSW Government Gazette.¹⁵ Some of these can be quite significant in terms of their impacts on water management in a given catchment. However, many members of the public either do not realise that the Gazette exists or do not know how to search it for water-related information.

It would therefore be useful if the WaterInsights portal were updated to include a feature that covers all water-related matters published in the Gazette. Ideally, these matters would be divided into logical categories and include a hyperlink to the order, regulation etc.

¹² In NSW, the applicable limitation period to seek judicial review of administrative decisions made under the WM Act is 3 months. See *Uniform Civil Procedure Rules 2005* (NSW), Rule 59.10.

¹³ This is invariably the case with open-cut mines, which result in significant quantities of ‘incidental take’ (which can in turn impact on surface water flows, depending on the level of connectivity between surface and groundwater).

¹⁴ <https://www.industry.nsw.gov.au/water/licensing-trade/licences/controlled/order-2020> (accessed 31 January 2021).

¹⁵ More broadly referred to as the ‘Notification of the making of statutory instruments, NSW Government Gazette and Bill information’.

7. Publication of rules in WSPs which protect environmental water in WaterInsights portal

WSPs vary considerably in terms of the rules that they may – or may not – contain to protect both held and planned environmental water (**HEW** and **PEW**). Some WSPs contain explicit rules designed to protect HEW and PEW in certain circumstances, whilst others contain none (beyond a general requirement to adhere to the plan limit for overall, long-term extractions and to respect licence conditions, approval conditions and account management rules). Given the importance of this issue, it would be useful to add a feature to the WaterInsights portal specifying which WSPs contain explicit rules to protect HEW and PEW and how they operate in practice.

8. Addition of a climate change feature to WaterInsights portal

We frequently use the ‘Climate Change Projection Data Explorers’ on the Climate Change Australia website, which is an initiative of the Bureau of Meteorology and CSIRO.¹⁶ These ‘Data Explorers’ include projections for mean temperature, minimum and maximum temperature, rainfall, evapotranspiration and so on for regional clusters and sub-clusters.

Whilst these data explorers are extremely useful, we would welcome equivalent climate change data for WSP areas in NSW (and indeed across the Murray-Darling Basin (**MDB**)). Aligning climate change data and catchment boundaries seems logical insofar as water management regulation and decision-making generally occurs at this scale.

To that end, we have been advised that Coupled Model Intercomparison Project Global Climate Models (**CMIP GCMs**)¹⁷ could be used to generate climate change projections at the WSP area scale. That is, GCM data could be ‘downscaled’ to a finer resolution to generate climate change projections for these areas.

By way of example, the NSW and ACT Regional Climate Modelling Project (**NARCLiM Project**) used CMIP3 GCMs to downscale climate change projections over the MDB to a 10km grid. Regional snapshots were also generated.¹⁸

While model simulations are uncertain, they do represent ‘best available science’ and arguably should be made available in an accessible form (accompanied by appropriate disclaimers) to inform public discussion and decision-making regarding water management.

¹⁶ <https://www.climatechangeinaustralia.gov.au/en/>

¹⁷ For more information about these models, see here:

<https://climatechange.environment.nsw.gov.au/Climate-projections-for-NSW/About-NARCLiM/CMIP3-vs-CMIP5> (accessed 01 February 2021).

¹⁸ <https://climatechange.environment.nsw.gov.au/Climate-projections-for-NSW/About-NARCLiM/NARCLiM-model-selection> (accessed 01 February 2021).

We would accordingly welcome the addition of a climate change feature to the WaterInsights portal comprising an interactive map divided into WSP areas. The map could include climate change scenarios for each of these areas across different time scales.

9. Further discussion regarding the merits of publishing more detailed use and accounting data

We would welcome further discussion between different stakeholders and First Nations representatives regarding the advantages and disadvantages of publishing water usage and account data at finer scales.

In making this comment, we note that some aggregate usage and account data for regulated catchments and the Barwon-Darling/Barka River is now included in the 'Trade dashboard', which is a welcomed addition. However, we recommend that additional explanatory material be provided to assist with the interpretation of this data (noting that people who are not well-versed in water account and usage rules and protocols may find it opaque).

10. Greater centralisation of information and terminology across MDB jurisdictions

While outside of the scope of this (state-based) inquiry into transparency, we do wish to briefly note that it is currently necessary to navigate multiple water registers, river gauge portals and other water-related platforms across numerous MDB jurisdictions. We strongly support greater centralisation of information and – to the extent possible – consistency of terminology and concepts across jurisdictions (in relation to water rights, for example).

Thank you for your consideration of our submission.

Yours sincerely

Environmental Defenders Office



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