

**Submission  
No 9**

## **INQUIRY INTO STATUS OF WATER TRADING IN NEW SOUTH WALES**

**Organisation:** Environmental Defenders Office

**Date Received:** 1 July 2022

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Environmental  
Defenders Office

## **Submission to the inquiry into the status of water trading in New South Wales**

**1 July 2022**

## **About EDO**

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

***Successful environmental outcomes using the law.*** With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

***Broad environmental expertise.*** EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

***Independent and accessible services.*** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

**[www.edo.org.au](http://www.edo.org.au)**

### **Submitted to:**

Committee Chair  
Inquiry into the Status of Water Trading in New South Wales  
Select Committee on the Status of Water Trading in New South Wales

### **Submitted online**

### **For further information on this submission, please contact:**

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Managing Lawyer, Nature

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Solicitor

## **A Note on Language**

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. Where possible, we have used specific references. More generally, we have chosen to use the term “First Nations”. We acknowledge that not all Aboriginal and Torres Strait Islander peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

## **Acknowledgement of Country**

The EDO recognises First Nations peoples as the Custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through law.

In providing these submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

## INTRODUCTION

The Environmental Defenders Office (**EDO**) welcomes the opportunity to provide the Select Committee with brief submissions on the status of water trading in New South Wales.

Our comments are made in light of our role as public interest environmental lawyers representing a diverse range of clients on water related matters in New South Wales including farmers, First Nations, scientists, conservation groups and community groups.

Our submission addresses the following terms of reference (**ToR**) of the Select Committee:

- **Aboriginal Water Dispossession (ToR (e) - Any Other Related Matter)**
- **The effectiveness of water registration and disclosure in New South Wales (ToR (c))**
- **The effects of water trading on the economy, communities and the environment (ToR (d))**

## SUMMARY OF KEY RECOMMENDATIONS

With respect to ToR (e) (“any other related matter”) we consider it pertinent for this inquiry to consider the impact of the water markets on the increasing trend of Aboriginal water dispossession since colonisation. Accordingly, we make the following recommendations regarding Aboriginal water dispossession:

- **Recommendation 1:** Ensure inclusion of First Nations voices and meaningful consultation with Aboriginal peoples as part of this inquiry.
- **Recommendation 2:** Explore avenues as to how water held by existing users can be re-allocated to Aboriginal people in the Murray Darling Basin (**MDB**).
- **Recommendation 3:** Limit barriers for Aboriginal people to enter the water market, including by removing fees and charges for entry, purchases and re-allocations.

With respect to ToR (c), we make the following recommendations regarding the effects of water trading on communities and the environment:

- **Recommendation 4:** Further scientific research and monitoring should be undertaken to ensure that the environmental risks of water trading are adequately managed.
- **Recommendation 5:** Trading rules that act as environmental safeguards should not be amended without rigorous assessment of the environmental consequences.

With respect to ToR (d), we make the following recommendations to improve the effectiveness of water registration and disclosure in NSW:

- **Recommendation 6:** Addition of ownership details to the NSW Water Register.
- **Recommendation 7:** Water access licences (**WALs**) owned by speculators and non-landholding traders who produce no agricultural output should be clearly identifiable on a Water Register and measured over time.
- **Recommendation 8:** Publication of aggregate data for categories of owners in the NSW Water Register.
- **Recommendation 9:** Addition of a Water Sharing Plan search feature in the NSW Water Register.

- **Recommendation 10:** Publication of water-related decisions and announcements in the WaterInsights portal, including dealings applications and controlled allocation orders.
- **Recommendation 11:** Publication of rules in WSPs which protect environmental water in the WaterInsights portal.
- **Recommendation 12:** Addition of a climate change feature to the WaterInsights portal.
- **Recommendation 13:** Additional explanatory material to be provided to make the available data more accessible (see item 9 of Annexure A).
- **Recommendation 14:** Greater centralisation of information and – to the extent possible – consistency of terminology and concepts across jurisdictions.

## RESPONSE TO TERMS OF REFERENCE

### ToR (e) - Any Other Related Matter: Aboriginal Water Dispossession

We acknowledge that the terms of reference for the Select Committee do not expressly seek submissions about the effects of the water market on Aboriginal peoples in NSW. However, the water market has facilitated a trend of Aboriginal water dispossession in the MDB which has continued since colonisation. This warrants the close attention of the Select Committee, as part of this inquiry.

The EDO has a long history of representing and collaborating with Aboriginal people and groups across NSW. In our experience, many Aboriginal people and groups are concerned about unsustainable water management generally, and Aboriginal water dispossession specifically. Accordingly, we consider it pertinent for this inquiry to consider the impact of water markets on what we call “water justice” for First Nations, and to challenge the assumption that moving water to its “highest value use” (as measured in economic terms) is inherently beneficial – and the best way to manage water in conditions of scarcity.

#### *First Nations Connection to Water*

First Nations peoples hold a deep cultural, customary and spiritual connection to water that is unique from the Anglo-Australian paradigm of water ownership and extraction.<sup>1</sup> Aboriginal peoples in the MDB have proclaimed the importance of water to the continuation of their culture as well as to the protection of their sacred sites and to the strengthening of the health and wellbeing of their communities.<sup>2</sup> Due to recent droughts and environmental degradation, Aboriginal communities in the MDB are experiencing poor social and economic conditions and those conditions are worsening.<sup>3</sup>

<sup>1</sup> Tony McAvoy, ‘Water - Fluid Perceptions’, Transforming Cultures eJournal, Vol 1, No 2, June 2006, pp 97-98.

<sup>2</sup> Collective statement by the Northern Basin Aboriginal Nations Board, 14 January 2016 in Moree. Republished in: Murray Darling Basin Authority, Our water, our life: an Aboriginal study in the northern basin (2016), p 6 <<https://www.mdba.gov.au/sites/default/files/pubs/Aboriginal-sociocultural-survey-report-Oct-16.pdf>>.

<sup>3</sup> Sefton, R, Peterson, D, Woods, R, Kassebaum, A, McKenzie, D, Simpson, B & Ramsay, M 2020, ‘Final Report: Independent assessment of social and economic conditions in the Murray–Darling Basin’, Panel for Independent Assessment of Social and Economic Conditions in the Murray–Darling Basin, p 39 <[https://www.mdba.gov.au/sites/default/files/pubs/seftons-report-september-2020\\_0.pdf](https://www.mdba.gov.au/sites/default/files/pubs/seftons-report-september-2020_0.pdf)>.

## *Water Market continues to facilitate Aboriginal Water Dispossession in the MDB*

Despite the significance of water to First Nations, recent peer reviewed research demonstrates that Aboriginal people and groups in the MDB hold a mere 2% of available surface water entitlements while making up approximately 10% of the population.<sup>4</sup> This is in large part due to historical circumstances and structural inequality, which has shaped water entitlements since colonisation.<sup>5</sup> It is a reflection of the gross inadequacy of existing governance and legal frameworks, such as the water market.

Water allocation for the purpose of water trade did not begin with a blank canvas. Instead, it was founded on existing rights to water which began with a riparian system of water regulation from the British common law. This system entitled landholders with an incidental right to use water from natural water sources passing through or adjacent to their land. The rights privileged the owner of the riparian land, and since the Australian Government did not recognise Indigenous land rights, First Nations did not benefit from those riparian rights.

Common law riparian rights were then replaced by legislative rights, which were tied to land (in NSW this occurred in the early 20<sup>th</sup> century by way of the *Water Act 1912* (NSW)). As Aboriginal Australians did not hold land titles, they did not enjoy access to statutory water rights either.<sup>6</sup>

During the 1990s, governments began to restructure water entitlements and introduced basin-wide caps on water extraction, created secure and tradeable water rights, and granted them to existing rights holders. In NSW, this culminated in the passing of the *Water Management Act 2000*, which unbundled water rights from land and created a water market. These reforms also ‘closed’ water resources to new entitlements (i.e. no new entitlements could be created).

While the introduction of a water market is not the sole cause of widespread Aboriginal water dispossession in the MDB, it permits and continues to facilitate a framework that normalises this historical inequitable distribution of water.<sup>7</sup>

The cultural and economic significance of water has been acknowledged by the NSW Government in a variety of reports and strategic documents. For example, the August 2021 NSW Water Strategy states that ‘*[w]ater is at the heart of Aboriginal People’s connection to Country and culture, and First Nations are acknowledged as the traditional custodians of all NSW water resources.*’<sup>8</sup> Action 2.3 of the NSW Water Strategy relates to providing Aboriginal people with ownership of and access to water for cultural and economic purposes, by *inter alia*, increasing water entitlements in Aboriginal ownership.<sup>9</sup>

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<sup>4</sup> Above n 2.

<sup>5</sup> Lana D. Hartwig, Sue Jackson, Natalie Osborne, Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession, Land Use Policy 99 (2020).

<sup>6</sup> Aboriginal land rights started emerging since the 1980s, culminating in the 1992 decision in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, which recognised native title for the first time. In 1983, the *Aboriginal Land Rights Act 1993* (NSW) was introduced to allow land claims to purportedly compensate for past injustices.

<sup>7</sup> Hartwig and Jackson, Submission to the Australian Competition and Consumer Commission, *Murray-Darling Basin Water Markets Interim Report*, 28 October 2020, p 2 <<https://www.accc.gov.au/system/files/Water%20Inquiry%20-%20Submission%20-%20Dr%20Lana%20Hartwig%20and%20Sue%20Jackson%20-%2028%20October%202020.pdf>>.

<sup>8</sup> NSW Department of Planning Industry and Environment, NSW Water Strategy (Report, February 2021), p 7 <[https://water.nsw.gov.au/\\_data/assets/pdf\\_file/0007/409957/nsw-water-strategy.pdf](https://water.nsw.gov.au/_data/assets/pdf_file/0007/409957/nsw-water-strategy.pdf)>.

<sup>9</sup> *Ibid*, p 62.

Despite these statements and commitments, the NSW Government has, to date, missed important opportunities to return water to Aboriginal peoples including by failing to return unallocated water to Aboriginal people. Similarly, the Federal Government has, to date, failed to take action. In 2018, there was an announcement by the Federal Government of \$40 million over four years to support Aboriginal Basin Communities by investing in cultural and economic water entitlements and associated planning activities. However, to date, no cultural water has been purchased. This inaction is despite a 2019 survey of MDB residents finding that 70% of respondents supported reallocating 5% of total irrigation entitlements to First Nations communities, with no preference for how that water should be used.<sup>10</sup>

In the absence of government action and in an essentially fully-allocated system, Aboriginal People must resort to the water market to obtain water access entitlements. However, access to the market is prohibitively expensive and First Nations in the MDB have difficulty in obtaining the financial resources to buy water.<sup>11</sup> Not only are water shares expensive, but they also incur annual fees and charges for trading or re-allocating water. Access to the market is also prohibitive because of information access barriers, water literacy gaps and the complexity of the market.<sup>12</sup>

This inquiry into the status of the water market in NSW must be done against this backdrop of historical, and ongoing, Aboriginal water dispossession in the MDB. Any reform must be led by Aboriginal people and result in tangible outcomes and justice, as opposed to aspirational and ultimately non-binding provisions in water legislation (which is largely the case at present).

### *Recommendations*

We consider that this inquiry presents an opportunity to consider ways in which Aboriginal water dispossession can begin to be reversed. Therefore, we make the following recommendations:

- **Recommendation 1:** Ensure inclusion of First Nations voices and meaningful consultation with Aboriginal peoples as part of this inquiry.
- **Recommendation 2:** Explore avenues as to how water held by existing users can be re-allocated to Aboriginal people in the MDB.
- **Recommendation 3:** Limit barriers for Aboriginal people to enter the water market, including by removing fees and charges for entry, purchases and re-allocations.<sup>13</sup>

### **ToR (c) - The effects of water trading on the economy, communities and the environment**

In 2020, the University of Adelaide published a water market literature review and empirical analysis for the Australian Competition and Consumer Commission that provided an overview of

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<sup>10</sup> Jackson, S, Hatton MacDonald, D & Bark, RH 2019, 'Public Attitudes to Inequality in Water Distribution: Insights From Preferences for Water Reallocation From Irrigators to Aboriginal Australians', *Water Resources Research*, vol. 55, no. 7, pp. 6033-6048.

<sup>11</sup> Murray Lower Darling Rivers Indigenous Nations, Submission to ACCC issues paper, Murray Darling Basin Water Markets Inquiry, 14 <[https://www.accc.gov.au/system/files/CombinedPDF\\_Water%20Inquiry%20-%20Submission%20-%20Murray%20Lower%20Darling%20Rivers%20Indigenous%20Nations%20%28MLDRIN%29%20-%2028%20Nov%2019%20%281%29.pdf](https://www.accc.gov.au/system/files/CombinedPDF_Water%20Inquiry%20-%20Submission%20-%20Murray%20Lower%20Darling%20Rivers%20Indigenous%20Nations%20%28MLDRIN%29%20-%2028%20Nov%2019%20%281%29.pdf)>.

<sup>12</sup> Above n 7, p 7.

<sup>13</sup> Above n 11, p 2.

the evidence on the environmental impact of water trade. It listed a summary of the risks and concerns associated with water trade, set out below:<sup>14</sup>

- concentration of extraction in areas which may already be feeling the impacts of over extraction;
- increased salinity in areas that require minimum irrigation intensities and that have experienced water entitlement loss;<sup>15</sup>
- moving water into locations where its extraction might have a negative impact on river water quality;
- increases in groundwater substitution<sup>16</sup> and increased groundwater use can lead to increased salinity problems if saline groundwater flows into rivers due to discharge;<sup>17</sup>
- activating previously unused water leaving less water in rivers to support ecosystems and reducing the amount of water in storages which leads to reduced water allocations in future seasons; and
- moving water extraction upstream, thereby resulting in reduced river flow from the new point of extraction to the old point of extraction.

However, there is limited scientific research and ongoing monitoring taking place to further understand these concerns, and limited actions in response to manage these risks and concerns.

Some legislative controls have been implemented to limit the potential for environmental harm. For example, the *Water Management Act 2000* (NSW) and related Water Sharing Plans in NSW contain certain safeguards for managing these risks, such as rules that prohibit trading between water sources in most water catchments. However, based on our experience working with clients throughout NSW, these controls are at risk of being diluted or completely removed at the expense of downstream users and the environment, as demonstrated in the below case study.

#### **Case study: McPhillamys Gold Project**

The McPhillamys Gold Project is situated in the headwaters of the Belubula River, near Blaney, NSW, in a small unregulated catchment. There are 264 megalitres of water available to trade in that catchment. However, if the project goes ahead, the proponent will seek to purchase water entitlement in the regulated downstream catchment of the Belubula River, to compensate for its water take upstream. That is because the project requires ten times more water than is available to trade in the project's own catchment.<sup>18</sup>

<sup>14</sup> University of Adelaide, Water Market literature review and empirical analysis prepared for the Australian Competition and Consumer Commission (ACCC) (29 May 2020), 92

<[https://www.accc.gov.au/system/files/University%20of%20Adelaide%20-%20Water%20market%20literature%20review%20and%20empirical%20analysis%20-%20Final%20report%20for%20ACCC\\_0.pdf](https://www.accc.gov.au/system/files/University%20of%20Adelaide%20-%20Water%20market%20literature%20review%20and%20empirical%20analysis%20-%20Final%20report%20for%20ACCC_0.pdf)>.

<sup>15</sup> Khan, S, Rana, T, Hanjra, MA & Zirilli, J 2009, 'Water markets and soil salinity nexus: Can minimum irrigation intensities address the issue?', *Agricultural Water Management*, vol. 96, no. 3, pp. 493-503.

<sup>16</sup> Wheeler, SA & Cheesman, J 2013, 'Key Findings from a Survey of Sellers to the Restoring the Balance Programme', *Economic Papers: A journal of applied economics and policy*, vol. 32, no. 3, pp. 340-352; Wheeler, S, Zuo, A & Kandulu, J 2020a, 'What water are we really pumping anyway? The substitutability between groundwater and surface water extraction in the Goulburn', Working paper, University of Adelaide, Centre for Global Food and Resources.

<sup>17</sup> Haensch, J, Wheeler, SA, Zuo, A & Bjornlund, H 2016, 'The Impact of Water and Soil Salinity on Water Market Trading in the Southern Murray-Darling Basin', *Water Economics and Policy*, vol. 2, no. 1, p. 26.

<sup>18</sup> The Department has calculated that the proponent requires 2,082 MLs of entitlement. Department of Planning, Industry and Environment, Letter to Planning and Assessment Group – Attachment A (10 February 2021) p 2 <<https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=PAE-9196073%2120210210T082338.765%20GMT>>.

Indeed, in advice to the proponent in the assessment of the project, the Water division of the Department of Planning, Industry and Environment (now Department of Planning and Environment) stated that it is working on water trading rules and guidelines, which would allow the trading of water upstream from regulated to unregulated water sources.<sup>19</sup> The Department advised the proponent that ‘this may provide a market based option for the proponent’.<sup>20</sup>

If the project goes ahead, the proponent also seeks to purchase a previously unused 192 megalitre water licence.<sup>21</sup> Because the water associated with this licence has not been extracted for use, it has remained in the catchment and has been available for the environment. However, if sold to the proponent, it will be available for extraction. This would mean that there will be significantly less water in the Belubula River to support the ecosystem and will reduce the amount of water in the Carcoar Dam storage.<sup>22</sup>

### *Recommendations*

We make the following recommendations, with respect to ToR (c):

- **Recommendation 4:** further scientific research and monitoring should be undertaken to ensure that the environmental risks of water trading are adequately managed.
- **Recommendation 5:** trading rules that act as environmental safeguards should not be amended without rigorous assessment of the environmental consequences.

### **ToR (d) - The effectiveness of water registration and disclosure in New South Wales**

In our capacity as public interest environmental lawyers acting for farmers, First Nations, scientists, and conservation and community groups in NSW, EDO frequently accesses the NSW Water Register, the Water Access Licence register, Environmental Water Register and the WaterInsights portal. EDO also has experience accessing comparable registers and databases in other Australian jurisdictions.

We therefore have a good understanding of 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.

Access to information and good water governance go hand-in-hand. Indeed, a great deal of mistrust in governments and between stakeholders could be avoided if more information was

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<sup>19</sup> Department of Planning Industry & Environment: Water, Letter to Stephen O’Donoghue (Letter, 22 June 2022) <<https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-9505%2120210722T030628.528%20GMT>>.

<sup>20</sup> Above n 18.

<sup>21</sup> Regis Resources Limited, Amendment Report McPhillamys Gold Project (September 2020) p 147 <<https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-9505%2120200908T074625.049%20GMT>>.

<sup>22</sup> Regis Resources Ltd, McPhillamys Gold Project Amendment Report (Report, September 2020), <<https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-9505%2120200908T074625.049%20GMT>>, p 137.

made publicly available (and in a readily accessible format). A recent peer-reviewed article by staff from the Stockholm International Water Institute affirmed the strong connection between rigorous water governance and access to information:

*For a multilevel governance structure to be effective it must be coherent and complimented by other governance attributes, such as effective and informed participation among the multiple decision-making centres and actors, for which transparent decision-making and access to information is needed.<sup>23</sup>*

Unfortunately, EDO and our clients remain concerned that public access to certain water-related information is lacking or non-existent in NSW. In particular, we are concerned that the following information is not publicly available:

- the names of licence holders;
- applications and approvals for trades; and
- applications and approvals for other statutory permits (for pumps, or to construct a levee or on-farm dams, for example).

Failure to supply this information in a readily accessible and meaningful format fuels distrust (which is anathema to collaborative water governance). As such, the current registration and disclosure measures must be significantly improved to increase their effectiveness.

#### *EDO 2020 submission regarding water market information platforms*

Between 30 November 2020 to 1 February 2021 the NSW Department of Planning and Environment sought public feedback on water market information platforms, to understand what information should be shared and how these platforms could be designed to be easier to use.

EDO's submission<sup>24</sup> to that public consultation is relevant<sup>24</sup> to the terms of reference of this inquiry and is enclosed at **Annexure A**.

#### *Further submissions regarding greater transparency and WAL ownership details*

After careful analysis and discussion with a variety of experts and clients, EDO contends ownership details for each water access licence (**WAL**) should be included in the NSW Water Register, which is free and publicly available. Our reasons are set out below.

- Other Australian jurisdictions already publish ownership details for water access licences for free, including in Queensland.
- Ownership details for every WAL in NSW can be accessed via the WAL Register, for a fee. As such, the information is in fact already publicly available to those who have the resources to pay a fee.
- Pursuant to cl. 7(i) of the *Privacy and Personal Information Protection Regulation 2019* (NSW), privacy laws do not apply to information contained in the WAL register.

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<sup>23</sup> Alejandro Jiménez, Panchali Saikia, Ricard Giné, Pilar Avello, James Leten, Birgitta Liss Lymer, Kerry Schneider and Robin Ward, *Unpacking Water Governance: A Framework for Practitioners*, Water, 2020: 12, 11.

<sup>24</sup> Environmental Defenders Office, *Public Consultation: water market information platforms in NSW*, (1 February 2021), <<https://www.edo.org.au/wp-content/uploads/2021/02/EDO-Submission-Transparency-and-Markets-010221.pdf>>.

We cannot see how greater transparency would negatively impact law-abiding licence holders or their commercial interests. Clearly, publicly available information could in fact benefit landholders where a lawful authorisation for an activity is in place.

However, a potential counter argument to greater transparency is that it is inconsistent with privacy laws or because the information is commercially sensitive. We do not think such concerns are justified. Under Australian laws, it is relatively easy to undertake searches to obtain information about individuals, property and companies. This includes land titles, encumbrances on land titles (including mortgages), company extracts, roles and relationship extracts and so on.

In NSW, development applications, development consents and pollution licences are also publicly accessible. That is because the law recognises the public interest in open access to this information. It is thus logically inconsistent to fail to extend the same level of access to the Water Register, particularly given the importance of managing water resources in a sustainable manner.

Indeed, it is widely acknowledged that our shared water resources must be managed sustainably and consistently with the law. This is particularly true in light of climate change and its likely impacts on water availability in NSW. The public interest in transparency far outweighs any concerns regarding confidentiality.

### *Recommendations*

To improve transparency, and the effectiveness of water registration and disclosure in NSW, we recommend:

- **Recommendation 6:** Addition of ownership details to the NSW Water Register;
- **Recommendation 7:** Water access licences (**WALs**) owned by speculators and non-landholding traders who produce no agricultural output should be clearly identifiable on a Water Register and measured over time;
- **Recommendation 8:** Publication of aggregate data for categories of owners in the NSW Water Register;
- **Recommendation 9:** Addition of a Water Sharing Plan search feature in the NSW Water Register;
- **Recommendation 10:** Publication of water-related decisions and announcements in the WaterInsights portal including, dealings applications and controlled allocation orders;
- **Recommendation 11:** Publication of rules in WSPs which protect environmental water in the WaterInsights portal;
- **Recommendation 12:** Addition of a climate change feature to the WaterInsights portal;
- **Recommendation 13:** Additional explanatory material to be provided to make the available data more accessible (see item 9 of Annexure A); and
- **Recommendation 14:** Greater centralisation of information and – to the extent possible – consistency of terminology and concepts across jurisdictions.

# Annexure A



# Environmental Defenders Office

1 February 2021

Submitted by email: [water.relations@dpie.nsw.gov.au](mailto: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.<sup>1</sup>

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:

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<sup>1</sup> 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 Crown<sup>2</sup>, while the ‘water sharing principles’<sup>3</sup> and associated duties include a mandatory obligation to prioritise ecosystem protection (that is, the commons) above private interests.<sup>4</sup>
- 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.<sup>5</sup>
- 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.<sup>6</sup> 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).<sup>7</sup>
- 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 Australia<sup>8</sup> and the Northern Territory.<sup>9</sup> The Western Australian register also includes the addresses of licence holders.

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<sup>2</sup> WM Act, s. 392(1), (2).

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

<sup>4</sup> WM Act, ss. 5(3), 9(1).

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

<sup>6</sup> *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*.

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

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

<sup>9</sup> <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)).<sup>10</sup>

## **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);<sup>11</sup> 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

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<sup>10</sup> *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.

<sup>11</sup> 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).<sup>12</sup>

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).<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.

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<sup>12</sup> 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.

<sup>13</sup> 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).

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

<sup>15</sup> 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.<sup>16</sup> 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**)<sup>17</sup> 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.<sup>18</sup>

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.

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

<sup>17</sup> 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).

<sup>18</sup> <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**

Dr Emma Carmody  
**Managing Lawyer – Freshwater**