Murray-Darling Basin Royal Commission

Issues Paper

THE PURPOSE OF THIS PAPER

1. The Murray-Darling Basin Royal Commission (The Commission) was established by the Governor of South Australia on 23 January 2018. In February, the Commission invited members of the public to make submissions in relation to its Terms of Reference concerning matters relevant to the Murray-Darling Basin Plan (Basin Plan). The Basin Plan was enacted in 2012 for the purpose of managing the water resources of the Murray-Darling Basin.

2. A large number of persons, organisations and Government Departments have been specifically invited to make submissions.

3. All participants in the submission process have been asked to submit their written submissions by 30 April 2018, and to address such of the Commission’s Terms of Reference as are relevant to them when making a submission.

4. The Terms of Reference for investigative and administrative inquiries are often, of necessity, very broad. The purpose of this issues paper is to briefly set out matters from the Terms of Reference that are the subject of focus by the Commission, so as to assist any person or organisation wishing to submit a submission, or in the process of preparing one. The Commission also hopes that this issues paper will help people in the preparation of oral contributions they may wish to make at community consultations, which will be held by the Commission across the Basin.

OVERVIEW

5. The Murray-Darling Basin covers more than one million square kilometres of the States of Queensland, New South Wales, Victoria, South Australia, and the Australian Capital Territory (Basin States). The major rivers of the Basin include the Murray, the Darling, the Murrumbidgee and the Lachlan, although the Basin is a system involving many other rivers and tributaries.

6. There are more than two million residents in the Basin, and thousands of businesses that rely on irrigation and its water resources. As well as significant
agricultural uses, the water resources of the Basin are important for the purposes of Indigenous culture, recreation, tourism and human consumption.

7. The Basin Plan is a legislative instrument of the Commonwealth Parliament made under section 44 (3)(b)(i) of the Water Act 2007 (Cth) (Water Act). The Basin Plan seeks to balance environmental objectives with impacts to businesses and communities throughout the Murray-Darling Basin, and more than two million residents of the states of Queensland, New South Wales, Victoria, South Australia and the Australian Capital Territory.

8. A central part of the objects of the Basin Plan, and those of the Water Act which commanded its preparation, is ensuring a “return to an environmentally sustainable level of extraction” for the ground and surface water resources of the Murray-Darling Basin.

9. The “outcome” sought for the Basin Plan is a “healthy and working Murray-Darling Basin”: section 5.02(2). That outcome is sought to be attained by achieving objectives that are largely environmental. These objectives include:

- Giving effect to relevant international agreements;
- Optimising social, economic and environmental outcomes arising from the use of Basin water resources;
- Protecting and restoring water dependant eco-systems and eco-system functions;
- Ensuring that water dependant eco-systems are resilient to climate change and other risks and threats;
- Maintaining appropriate water quality including salinity levels;
- Water security;
- Ensuring that environmental watering is coordinated.

(See in general chapter 5 of the Basin Plan, and chapter 8 concerning the environmental watering plan).

10. Central to obtaining the outcomes and objectives for the Basin Plan was the setting of the “long-term average sustainable diversion limit” for surface water and groundwater from the Murray-Darling Basin. At the time of the enactment of the Basin Plan in 2012, the Murray-Darling Basin Authority (MDBA) estimated that the long-term average sustainable diversion limit (SDL) for all surface water was 10,873GL per year. This reflected a reduction of 2,750GL per year from the
MDBA’s estimate of the baseline diversion limit of all surface water – that is, the current annual consumptive use for surface water (13,623GL).

11. Under the Basin Plan, the Murray-Darling Basin is divided into the Northern and Southern Basin and into various zones described as the Northern Basin Queensland zone, the Northern Basin New South Wales zone, the Southern Basin Victoria zone, the Southern Basin New South Wales zone, the Southern Basin South Australia zone and the Southern Basin Australian Capital Territory zone: see section 6.05 of the Basin Plan.

12. For each of these zones, areas have been divided into SDL resources units, all of which have an SDL. These SDLs are to be incorporated into water resource plans, which must be accredited – and are due to take effect on – 1 July 2019: see chapter 10 of the Basin Plan.

13. The Basin Plan also provides for an Environmental Watering Plan (EWP) for coordinating the use of water in the Basin for environmental purposes, and in particular the objectives of protection and restoration of the water dependent ecosystems of the Basin: see Chapter 8, Part 2 of the Basin Plan.

14. The EWP requires each Basin State to prepare long term environmental watering plans for each water resource plan area. Such plans have mandatory requirements, and must be consistent with the EWP, and be included in all water resource plans: section 10.26 of the Basin Plan.

15. There is some current public discussion regarding the adjustment mechanism for SDLs set out in chapter 7 of the Basin Plan. Under this chapter, the Basin Officials Committee can nominate “supply measures” – measures designed to operate so as to increase the quantity of water available to be taken in a set of surface water SDL resource units – such that the SDL can be increased (and the annual reduction of 2,750GL decreased). Examples given of such measures in the Basin Plan include:

- Reconfiguring lakes or storage systems to reduce evaporation;
- Reducing the quantity of water required to deliver water at a particular place for either consumptive or environmental use;
- Changing the method of environmental watering in such a way that equivalent environmental outcomes can be achieved with a smaller quantity of water.
16. Thirty-six such projects have been analysed by the MDBA for the purpose of the Southern Basin. As a result of that analysis, the MDBA has proposed to the Commonwealth Minister for Agriculture and Water Resources that the Southern Basin surface water SDL be adjusted such that the amount of water that needs to be recovered each year from consumptive use (2,750GL) be reduced by 605GL: see section 23A of the Water Act. The Minister adopted the proposed adjustment (section 23B), but this issue was subject to a disallowance motion in the Senate, which has been deferred to May 2018.

17. Adjustments to SDLs can also be made as a result of an “efficiency measure”: that is, a measure that operates to decrease the quantity of water required for one or more consumptive uses in a set of surface water SDL resource units, provided it has neutral or positive socio-economic outcomes. Examples given in the Basin Plan of such measures are:

- Lining channels to reduce water losses within an irrigation network;
- Replacement of less efficient irrigation methods with drip irrigation.

18. The Basin Plan provides that a Basin State or the Commonwealth can notify the MDBA of an efficiency measure on or before 31 December 2023, that in its view should be taken into account in proposing adjustments to the SDLs under chapter 7.

19. The aim of such measures is to “deliver 450GL of additional environmental water (water for environmental purposes) above the figure of 2,750GL”. The objective of the additional 450GL of environmental water, together with the implementation of “constraints measures”1, is to “allow the enhanced environmental outcomes” set out in schedule 5 of the Basin Plan to be “pursued”. The majority of enhanced environmental outcomes relate to issues concerning the water quality, salinity levels, and amount of flow to the Coorong, Lower Lakes, and the Murray Mouth at the Southern end of the system.

ESTABLISHMENT OF THE ROYAL COMMISSION

20. Following allegations of illegal take aired on the ABC’s Four Corners program in July 2017, the South Australian Government announced that it intended to set up a Royal Commission into the Basin Plan to examine – amongst other matters - issues surrounding those allegations.

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1 A constraint measure means a measure that removes or eases a physical or other constraint on the capacity to deliver environmental water to the environmental assets of the Murray-Darling Basin.
21. The Commission was established on 23 January 2018. Prior to this, draft terms of reference were made publically available for comment and submission. The final Terms of Reference are available on the Commission’s website: www.mdbrc.sa.gov.au.

POWERS AND NATURE OF THE ROYAL COMMISSION

22. The Commission’s expectation is that it will receive cooperation and assistance from people, organisations and government departments from which it seeks documents and information, or who it invites to give evidence at a private or public hearing. To the extent it becomes necessary for the Commission to issue a summons to compel the production of documents, or the attendance of a witness to give sworn evidence, the Commission considers that the provisions of the Royal Commissions Act 1917 (SA) and the Service and Execution of Process Act 1992 (Cth) give it, as a Commission of Inquiry/Tribunal carrying out investigative functions, the power to:

- compel the production of documents from any Australian jurisdiction;
- compel the attendance of a witness of any State or Territory to give evidence.

23. While the Commission was established by the Governor of South Australia, it is important to note the following matters:

- The Commission is independent of government. It does not take direction from government as to the methods of its information gathering, the finding of facts it may make, the opinions it may express, or the recommendations it ultimately makes;
- The Commission does not represent South Australia, and in simplistic terms does not take a position “for” South Australia, or “against” any other Basin State;
- The Commission’s Terms of Reference require it to investigate matters and inform itself of issues across the entire Basin. Again, in simplistic terms, its Terms of Reference to not require it to “promote” the Basin Plan, but to independently consider issues in relation to it.

TERMS OF REFERENCE

24. While all persons and organisations wishing to lodge a written submission should consider the Terms of Reference in full, in summary they raise the following issues:
• Whether water resource plans required to be prepared under the Basin Plan will be prepared in a form compliant with the Basin Plan and accredited by 1 July 2019.
• Whether the Basin Plan in its current or any amended form is likely to achieve the objects, purposes and desired outcomes of the Water Act and Basin Plan.
• Whether the Basin Plan is likely to achieve the “enhanced environmental objectives” and the recovery of 450GL of water through efficiency measures.
• Whether appropriate enforcement proceedings have been taken in relation to any instances of alleged or found illegal take of water, and whether the compliance and enforcement powers in the Water Act are adequate.
• Whether water purchased for environmental use has been, or will be, adequately protected from consumptive use.

COMMUNITY CONSULTATIONS

25. The Commission intends to visit a number of regional centres and sites important to the Basin Plan. It will hold a series of community consultations in these places, which commenced with a community consultation in Murray Bridge on 29 March 2018. Other places and towns will be visited for consultation purposes, and the dates for these will be advertised, as well as listed on the Commission’s website.

26. The Commission is well aware that it is not the first body to invite residents or organisations of the Basin, with an interest in the Basin Plan, to attend a community consultation. Such consultations have in fact been frequent, and ongoing, for many years. People, understandably, might feel they have said all that they can about the Basin Plan, and to too many people on too many occasions.

27. While the Commission understands people affected by the Basin Plan may be feeling fatigued by ongoing consultation, the Commission’s desire to hear from people who live in Basin communities and are affected by the Plan is genuine, and the desire is for the process to be a real engagement. All communities should feel confident that the Royal Commission is independent, and represents no vested interest. The Commission welcomes the opportunity to speak to people outside the main cities concerning their experience – good or bad – of the Basin Plan, and to hear their insights in relation to it.
AREAS OF PARTICULAR FOCUS

28. In the course of its reading and information gathering processes to date, the following matters have been identified as ones of particular interest to the Commission, and that fall within one or more of its Terms of Reference. The Commission would be interested in receiving submissions that engage with the following issues (although persons or organisations intending to lodge a submission or speak at a community consultation should feel free to deal with any of the Terms of Reference):

a) **Process used to determine the “Environmentally Sustainable Level of Take”**

The Water Act requires the MDBA to determine an environmentally sustainable level of take (ESLT) for the Basin’s water resources, which must be reflected in the SDL for the Basin.

In its 2011 report *“The Proposed ‘Environmentally Sustainable Level of Take’ for surface water of the Murray-Darling Basin: Method and Outcomes”*, November 2011, (ESLT Report) the MDBA sets out an explanation of the method it devised and used for determining the ELST, which was ultimately reflected in the SDL in the Basin Plan in 2012. The Report sets out:

- the MDBA’s interpretation of the requirements of the Water Act insofar as it considers those requirements relevant to the task of setting the ESLT;
- based on its interpretation of the Water Act, the MDBA’s 7-step method to determine the ESLT, which includes certain policy decision at various points;
- the MDBA’s determination of the ESLT based on its use of the 7-step method, modelling results and its consideration of other matters, including socio-economic impacts and climate change.

The MDBA indicates various points in its process for determining the ESLT at which it incorporated socio-economic considerations into its decisions; certain judgments about available scientific evidence; various practical and policy assumptions and limitations influencing the method and the modelling, and its approach to climate change. The MDBA’s method for determining the ELST still stands, although changes to the SDL volume have since been proposed via the SDL adjustment mechanism and the Northern Basin Review.
The Commission is interested to receive all submissions from interested persons and organisations in relation to the MDBA’s method for determining the ESLT, with particular reference to what the MDBA has expressed as being the requirements of the Water Act, and the method of determining the ESLT as set out in the ESLT Report.

b) 36 Supply Measure Projects
   On 5 May 2016 the Basin Officials Committee notified the MDBA of 36 supply and 2 efficiency projects to be taken into account in the SDL adjustment mechanism under Chapter 7 of the Basin Plan.

   Prior to this notification, the Basin States and the Commonwealth Government had agreed a “Protocol for Consideration of Surface Water Sustainable Diversion Limit (SDL) Adjustment Measures”: Schedule 1 of the “Intergovernmental Agreement on Implementation of Water Reform in the Murray Darling Basin” (IGA).

   With reference to the Protocol from the IGA, the MDBA prepared the following Assessment Guidelines for Constraint and Supply Measures, which set out a number of assessment criteria that must be addressed by the proponents for any such projects:
   - Phase 1 Assessment Guidelines (Feasibility Studies)
   - Phase 2 Assessment Guidelines (Business Cases – for which $34.5 million of Commonwealth funds were made available)
   - Phase 3 Assessment Guidelines (Confirmation of Projects)

   It has become clear that there is some dispute as to whether the 36 supply measures submitted to the MDBA as a justification for increasing the Basin Plan SDL should be approved, including whether such projects met the requirements of the Assessment Guidelines referred to above. The proposed increase to the SDL by 605 GL (a decrease in the amount of water that needs to be recovered for environmental purposes) will be considered by the Senate in May 2018. The Commission is interested to receive all submissions from interested persons and organisations in relation to this issue.

c) Recovery of 450GL for Enhanced Environmental Outcomes
   The Basin Plan provides that Basin States and the Commonwealth can submit “efficiency measures” which, together with “constraints measures” are aimed at the recovery of an additional 450GL of environmental water
(see section 7.09(e) of the Basin Plan), which itself is aimed at achieving the “enhanced environmental outcomes” outlined in schedule 5 of the Basin Plan. $1.77 billion of Commonwealth funds are available for such efficiency projects, but they appear to be voluntary.

Limited progress appears to have been made on these efficiency measure projects. It appears that there is in general a lack of support for them, or understanding of them.

There also appears to be some disagreement, at an expert level, as to whether “efficiency measures” will be sufficient to recover this additional 450GL and if they can be implemented in a way that does not result in negative socio-economic outcomes for communities.

The Ministerial Council commissioned Ernst & Young to provide advice regarding how to design, target and resource efficiency measures programs that can recover the 450GL with neutral to positive socio-economic impacts. That report was released in January 2018.

The Commission is interested to receive all submissions from interested persons and organisations in relation to the recovery of the 450GL, the EY report and efficiency measures generally.

d) Water recovery to date

As at 31 December 2017, the MDBA estimated that 2,106.4GL had been recovered, primarily through buybacks of water entitlements and infrastructure investments. This leaves just over 640GL of water still to be recovered of the 2,750GL target (not including the 450GL for the “enhanced environmental objectives”).

There appears to be disagreement, including at an expert level, as to whether the figure of 2,106.4GL has in fact been recovered, to what extent that figure is accurate (particularly with regard to infrastructure investments) and the Commonwealth has access to that volume of water for environmental use, and to what extent that return has been compromised by illegal take.

The Commission is interested to receive all submissions from interested persons and organisations in relation to these issues.
Northern Basin Review
The Northern Basin Review conducted by the MDBA resulted in a recommendation to adjust the SDLs in the Northern Basin by reducing the recovery target from 390GL to 320GL. This recommendation, which was approved by the relevant Commonwealth Minister, was the subject of a disallowance motion in the Senate in February 2018, and has been the subject of expert commentary and criticism.

The Commission is interested to receive all submissions from interested persons and organisations in relation to the Northern Basin review, the reduction of the recovery target from the Northern Basin of 70GL, and the “toolkit measures” referred to in the Northern Basin review.

Views of Indigenous People
Part 14 of the Basin Plan states that water resource plans must identify the objectives of Indigenous people in managing the water resources of a water resource plan area and the outcomes they desire for the management of water resources in a water resource plan area. Regard must be had to the “social, spiritual and cultural values of Indigenous people that relate to the water resources of a water resource plan area”: see section 10.52. Further, section 10.54 of the Basin Plan requires that the Basin States must have regard to the views of Indigenous people with respect to cultural flows in the preparation of water resource plans.

The following definition of cultural flows is currently used by the Northern Murray-Darling Basin Aboriginal Nations and the Murray Lower Darling Rivers Indigenous Nations:

“Water entitlements that are legally and beneficially owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is our inherent right” (see for example paragraph 31 of schedule 1 of the Basin Plan).

The Commission is concerned that water resource plans are being prepared in circumstances where, as a matter of law, it arguably could be said that these plans are not being prepared “having regard to the views of Indigenous people with respect to cultural flows” in accordance with at least some available constructions of that phrase.
The Commission is interested to receive any submissions from interested persons and organisations in relation to this issue.

g) **Illegal Take**

There have been allegations raised in various investigative reports (Ken Matthews Inquiry; NSW Ombudsman; MDBA Compliance Review November 2017; Independent Expert Panel Review November 2017), and media reports concerning matters such as:

- Illegal take, or the take of water beyond an entitlement;
- Tampering with water meters;
- Inadequacy of metering;
- Inadequacy of determining how much water has been taken for consumptive use;
- Lack of protection for environmental water;
- Use of Commonwealth funds under the Basin Plan for works or for purposes other than the work or purposes for which the funds were provided;
- The alleged overpayment by the relevant Commonwealth Department for the surrender of water entitlements, or of payment for water entitlements that are of a kind that should not be counted towards the recovery of environmental water.

Concerns have also been raised about a lack of appropriate enforcement action or investigation into allegations of illegal take.

The MDBA, and an Independent Panel asked to advise the Government on compliance and enforcement matters, has also commented on the relative lack of power given to the MDBA in the Water Act in relation to matters of compliance and enforcement.

The Commission is interested to receive any submissions in relation to these issues across the Basin. It should be noted however that the Commission will not be interfering, or taking any steps to interfere, with any police investigation or State based prosecution that may be ongoing in relation to any such matters.

h) **Irrigated Crops**

There is public discussion over whether particular irrigated crops are taking more water for consumptive use than is practical given the volume of water
available for such use in the Murray-Darling Basin – that is, given the environmentally sustainable level of take.

There has also been public discussion about the expansion of development for irrigated crops in parts of the Basin, and whether there is sufficient water in the Basin to support such ongoing development and still achieve the outcomes and objectives of the Basin Plan.

The Commission is interested to receive any submissions from persons or organisations in relation to these issues.

i) Constitutional basis for Water Act
The Constitutional basis for the Water Act (section 9) is dependent on a number of the powers under section 51 of The Constitution. The most important of these may be the external affairs power (section 51 (xxxix)), particularly with regard to the object of the Water Act and the Basin Plan to give effect to relevant international agreements concerning the environment and ecology (amongst other relevant objects).

The Commission is interested in receiving submissions on the issue of whether there is sufficient power vested in the Commonwealth Government under The Constitution to impose obligations on Basin States under the Basin Plan without a referral of power from those states under s 51 (xxxvii) of the Constitution.

j) Darling River and Menindee Lakes
The Commission is concerned with reports and evidence as to the lack of flow in parts of the Darling River, and warnings about algal bloom outbreaks, and the low level of storage in the Menindee Lakes.

There have also been criticisms made at an expert level concerning changes made to the Barwon-Darling Water Sharing Plan that has allowed pumping at low river levels.

The Commission is interested to receive submissions from persons or organisations in relation to this issue.

k) Deadline for Water Resource Plans
The Commission has read reports and information identifying a risk that water resource plans required to be prepared under the Water Act and
Basin Plan will not be submitted to the MDBA in sufficient time for accreditation by 1 July 2019.

The Commission is interested to receive any submissions from persons or organisations concerning this issue.

I) Environmental and Ecological Health of the Murray-Darling Basin

There are varying reports as to whether the Basin Plan, since 2012, has achieved any of its objectives of improving the health and resilience of the eco-systems and ecological functions of the Murray-Darling Basin, the floodplains, the wetlands and other areas of ecological significance, and the extent to which progress is being made on the desired outcome of a “healthy and working Murray-Darling Basin”.

There is also expert disagreement as to whether the objectives of the Basin Plan concerning key environmental assets and key ecosystem functions, and the enhanced environmental objectives, can be achieved at either a water recovery target amount of 2,750GL, or 3,200GL, or such other target depending on legislative change as a result of SDL adjustments.

There is public concern that water for environmental purposes in parts of the Basin may not be delivered to environmental targets due to a lack of regulatory protection for that water.

The Commission is interested to receive submissions from any persons or organisations concerning these issues.