

05 February 2018

Terry Korn
President
Australian Floodplain Association

Dear Terry,

Changes to the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012

1. The Australian Floodplain Association (**AFA**) has requested advice in relation to the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012 (**Gazetted BD WSP**). Specifically, it has sought advice regarding the changes that occurred between the publicly exhibited Draft Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources (**Draft BD WSP**) and the Gazetted BD WSP (which commenced on 04 October 2012).
2. The advice is divided into the following 5 parts:

Part 1: Summary of advice

Part 2: Background

Part 3: Key changes to the Gazetted WSP

Part 4: Other changes under the WM Act

Part 5: Water shepherding and amendments to enable accreditation

Part 1: Summary of advice

Changes to the Gazetted BD WSP

3. Based on our analysis, the Gazetted BD WSP contained a number of significant changes (relative to the Draft BD WSP). The key changes are as follows:
 - The removal of total daily extraction limits (**TDELS**).
 - The removal of the 450% limit on take over three consecutive years.
 - The removal of the Minister's discretion to remedy a breach of Schedule E of the Murray-Darling Basin Agreement (that is, the Minister's discretion to remedy a breach of the cap on extractions¹ by way of an appropriately adapted limit on extractions for subsequent years).
 - Greater access to No Flows and Low Flows and the introduction of 'imminent flow' rules.

¹ Measured as a long-term annual average.

- Extending the period of time in which licences can be converted on a 1:1 basis (from B or C to A, for example) by 4.5 years.
 - Allowing the share component to be traded from one licence to another licence with a lower cease-to-take condition in limited, prescribed circumstances.
 - The removal of the requirement to assess current long-term average annual extractions using a model set to represent as closely as possible current water use development, supply system management and other factors affecting the long-term average annual extraction volume. The replacement rules mean that the modelling used to determine current annual average extractions may be based on outdated and inaccurate information. It also means that any assessment of compliance with the long-term annual average limit on extractions (also known as the ‘cap’ on extractions) may be based on outdated and inaccurate information.
4. We further note that as at 05 February 2018, Individual Daily Extraction Limits (**IDELs**) have still not been introduced, despite being provided for in the Gazetted BD WSP. If introduced, IDELs would impose a daily limit on the volume of water that could be extracted under individual licences.

Other changes under the WM Act

5. A Class entitlements held under the Water Act 1912 were – with very limited exceptions – only attached to pumps between 80mm and 150mm in diameter.² This imposed a natural limitation on the volume of water that could be extracted by entitlement holders during A Class flow events.
6. Analysis of A Class licences that are currently held under the WM Act show that many of these licences are now attached to multiple 600-660mm pumps. For example, the largest A Class licence (for 4,086.50 GL) on the Barwon-Darling River is now attached to 13 pumps that are between 610mm and 660mm in diameter.³
7. We further note that the WM Act does not prohibit A Class water from being stored on-farm (as opposed to only being pumped directly onto crops).

Water shepherding and amendments to enable accreditation

8. Relevantly, the Gazetted WSP states that it can be amended to allow for water shepherding (which, if properly implemented, would provide for event-based management of environmental flows in the Barwon-Darling River).⁴
9. The Gazetted WSP also states that it ‘may be amended to enable a water resource plan to be accredited under the *Water Act 2007* of the Commonwealth.’

² DPI Water, *Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources - Background Document*, September 2012. Schedule 7 of this document sets out the works (that is, pumps) authorised by each *Water Act 1912* licences at commencement of the WSP.

³ WAL37045 attached to works approvals 85CA753627 and 85WA753315.

⁴ Gazetted WSP, 84(1)(c).

Part 2: Background

10. The 'Draft Water Sharing Plan Barwon-Darling Unregulated and Alluvial Water Sources - Order' (**Draft WSP**) was placed on public exhibition in October 2011.
11. Following exhibition, the BD WSP was made under s.50 of the *Water Management Act 2000* (NSW) (**WM Act**). It commenced on 4 October 2012 following its publication in the NSW Government Gazette.⁵
12. Upon commencement of the Gazetted BD WSP, the water licensing and approval scheme that applied to the Barwon-Darling under the *Water Act 1912* (NSW) (**1912 Act**) was replaced by the licensing and approval scheme under the WM Act and Gazetted BD WSP.
13. Based on our analysis, the Gazetted BD WSP diverged considerably from the Draft WSP. While the Minister has broad discretion under the WM Act to gazette a WSP that is materially different to the version that was put on public exhibition, the community has expressed considerable concern regarding these changes and the manner in which they occurred. These changes are discussed in the following part of this advice.

Part 2: Key changes to the Gazetted WSP

14. The table below outlines the **key changes** that occurred to the Gazetted BD WSP. An exhaustive list can be provided at a later date, if required.

Rule in Draft WSP	Rule in Gazetted WSP
TDELS	
Rule 49 established Total Daily Extraction Limits (TDELS) for all A, B and C Class licences in each of the 4 river sections that comprise the Barwon-Darling River. These TDELS are set out in Annex 1 of this advice.	Does not include TDELS. Specifically, Rule 51 states that '[a]t the commencement of this Plan, 'there are no total daily extraction limits (hereafter TDELS) established for access licences in these water sources.' In summary, TDELS have been removed.
IDELs	
Rule 50 states that there are no Individual Daily Extraction Limits (IDELs) at the commencement of the Plan but notes that they will be issued for A, B and C Class licences during the life of the Plan.	Rule 52 states that there are no Individual Daily Extraction Limits (IDELs) at the commencement of the Plan but notes that they will be issued for A, B and C Class licences during the life of the Plan. Note: as at 05 February 2018, IDELs have not been introduced.
Account management rules	
Rule 44 sets out the individual access licence account management rules. Rule 44(2) states that the maximum volume that can be extracted in any one year under an A, B or C Class licence is 3 x share component + any water temporarily	Rule 42 sets out the individual access licence account management rules. Rule 42(3) states that the maximum volume that can be extracted in any one year under an A, B or C Class licence is 3 x share component + any water temporarily

⁵ BD WSP, cl. 3.

<p>assigned + any water re-credited to the account under s. 76 of the WM Act.⁶</p> <p>Rule 44(3) states that the maximum volume that may be taken in 3 consecutive years under an A, B or C Class licence is 1.5 times (that is, 450%) of the volume permitted under 44(2).</p> <p>The Minister’s note states that ‘the rules in clause 44(3) impose further limits on the water that may be taken under an access licence in any three consecutive water years and are intended to prevent access licence holders changing their irrigation patterns to become more opportunistic, thus limiting the potential for short-term annual extractions to be significantly larger than the long-term annual average extraction limit.’</p>	<p>assigned + any water re-credited to the account under s. 76 of the WM Act.</p> <p>In summary, the 450% limit on take over three consecutive years has been removed.</p>
<p>Compliance with Schedule E of the Murray-Darling Basin Agreement</p>	
<p>Rule 44(4) states that where the Murray-Darling Basin Ministerial Council (MinCo) considers that the combined Barwon-Darling Lower Darling Valley is in breach of Schedule E and the State Minister has agreed to address this breach, then the Minister may – at their discretion – announce the maximum volumes that may be taken under an A, B or C Class licence.</p> <p>Note that Schedule E sets out the overall long-term annual average cap on extractions for each designated valley in the Murray-Darling Basin.</p>	<p>Rule 42(6) provides that the Minister may only limit the maximum volume of water that may be taken under an A, B or C Class licence where MinCo considers that the Barwon-Darling valley within the larger Barwon-Darling Lower Darling Valley is in breach of Schedule E and the Minister has agreed to address this breach.</p> <p>Rule 42(4) removes the Minister’s discretion to impose any limitation that they see fit. Rather, where Rule 42(6) has been satisfied, the Minister may only limit the volume of water that may be taken under an A, B or C Class licence to 1 x share component + any water temporarily assigned + any water re-credited to the account under s. 76 of the WM Act. This is in place of 3 x these volumes, as provided for under Rule 42(3).</p> <p>In summary, the changes have removed the Minister’s discretion to remedy a breach of Schedule E with an appropriately adapted limit on extractions.</p>

⁶ Section 76 of the WM Act provides for the creation of a regulation that allows for return flows to be re-credited to water allocation accounts. No such regulation has ever been made.

Flow classes and daily access rules

<p>Rule 48 (1)-(5) inclusive prohibits:</p> <ul style="list-style-type: none"> - water being taken under an A, B or C Class licence when flows in the relevant management zone specified in the extraction component of the licence are in the No Flow or Low Flow Class. - water being taken under a B Class licence when flows in the relevant management zone are in the A Class. - water being taken under a C Class when flows in the relevant management zone are in the A or B Class. <p>Rule 49(9) states that the following exemptions apply to these prohibitions:</p> <ul style="list-style-type: none"> - Licences specified in Column 1 of Schedule 3. - The licence listed in clause 1 of Schedule 4 for the taking of up to 20 kilolitres/day for: fruit washing; clearing of dairy plant and equipment for hygiene purposes; poultry watering and misting; or cleaning of enclosures intensive animal production for hygiene purposes. - The taking of water for domestic consumption only under a stock and domestic licence that existed at the commencement of the BD WSP up to 1 kilolitre/day. - The taking of water for stock consumption only under a stock and domestic licence that existed at the commencement of the BD WSP up to 14 litres/grazeable hectare per day. Only permissible for the first 5 years of the Plan 	<p>The most significant changes are as follows:</p> <ul style="list-style-type: none"> - Rule 47 allows ‘access for survival watering’ in the first 5 years of the Plan for specified permanent plantings. Specifically, the Minister may grant permission for the holder of an A Class licence in the Culgoa River Junction to Bourke Management Zone to access water from the Bourke weir pool when flows in that Zone are in the No Flow Class, subject to certain conditions being met.⁷ - Rule 47 allows ‘access for survival watering’ in the first 5 years of the Plan for specified permanent plantings. Specifically, the Minister may grant permission for the holder of an A Class licence anywhere within the Barwon-Darling River to take water when flows in the relevant management zone are in the Low Flow Class, subject to certain conditions being met.⁸ - Rule 48 allows access to ‘imminent flows’ under A Class licences, subject to specified conditions. This allows access to No Flow and Low Flow water provided flows will be in the A Class for the relevant management zone within 3 weeks of access being granted.⁹ - Rule 49 allows access to ‘imminent flows’ under B Class licences, subject to specified conditions. This allows access to No Flow, Low Flow or A Class water provided flows will be in the A Class for the relevant management zone within 3 weeks of access being granted.¹⁰ <p>In summary, these changes allow greater</p>
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⁷ See: 47(2)-(6) inclusive and the table in clause 2 of Schedule 4. Relevantly, Rule 47(2)(b) provides that the A Class licence must have arisen from a *Water Act 1912* entitlement specified in Column 1 of the table in clause 2 of Schedule 4. We note that this table only lists 4 entitlements, 1 of which was converted into the largest A Class licence in the Barwon-Darling River (now WAL 37045 which is currently allocated 4,086.50 and held by Bengorang Ltd, which is in the Culgoa River Junction to Bourke Management Zone).

⁸ Ibid.

⁹ See 48(1)-(6) inclusive.

¹⁰ See 49 (1)-(6) inclusive.

<ul style="list-style-type: none"> - The taking of water from a runoff harvesting dam or pool created by a structure covered by a water supply work approval. - The taking of water under a local utility access licence or a “Town water supply” access licence to which clause 2 of Schedule 4 applies. <p>In summary, these rules prohibit a licence holder from accessing flows in a lower flow class and from accessing No or Low flows - except in very limited circumstances.</p> <p>As a consequence, these rules do not provide for A or B Class licences to access water in a lower flow class when flows are imminent.</p>	<p>access to No and Low Flows and introduce ‘imminent flow’ rules.</p>
<p>Access licence dealing rules</p>	
<p>Conversion: Rule 61 allows the conversion of an access licence to a new licence category¹¹ on a 1:1 basis¹² and subject to certain conditions¹³ and only before 1 December 2012. Conversions are prohibited after this date.</p>	<p>Conversion: Rule 63 allows the conversion of an access licence to a new licence category¹⁴ on a 1:1 basis¹⁵ and subject to certain conditions¹⁶ and only before 30 June 2017.</p> <p>In summary, the changes extend the period of time in which licences can be converted (from B or C to A, for example) by 4.5 years.</p>
<p>Trading share component between licences of the same category/class (s. 71Q dealing) Rule 63 allows the share component of an A, B or C Class licence to be traded to another access licence up to a maximum volumetric limit for each class of licence within each of the 4 river sections that make up the Barwon-Darling River. Dealing must occur after 1 December 2012.</p>	<p>Trading share component between licences of the same category/class (s. 71Q dealing) Rule 64 is the same, although dealings can occur before 1 December 2012.</p>

¹¹ That is, a B Class licence can be converted to an A Class licence, while a C Class licence can be converted to either an A or B Class licence (subject to certain conditions). These are known as s. 71O dealings (under s. 71O of the WM Act).

¹² 61(3).

¹³ 61(2),(3).

¹⁴ That is, a B Class licence can be converted to an A Class licence, while a C Class licence can be converted to either an A or B Class licence (subject to certain conditions). These are known as s. 71O dealings (under s. 71O of the WM Act).

¹⁵ 63(2).

¹⁶ 63(1)-(3) inclusive.

<p>However, it prohibits trading a share component from one licence to another licence that is subject to lower cease-to-take conditions (presumably to avoid over-extracting lower flows).¹⁷</p>	<p>Trading a share component from one licence to another licence that is subject to lower cease-to-take conditions is not prohibited as long as:</p> <ul style="list-style-type: none"> • the trade is to 1 of 5 specified C Class licences; and • does not result in the licence holder who acquired the shares to hold more C Class shares than the sum of the concessional conversion limits for the 5 specified C Class licences; and • occurs before 1 July 2017.¹⁸ <p>In summary, the changes allow the trading of a share component from one licence to another licence that is subject to a lower cease-to-take condition in certain circumstances.</p>
<p>Calculation of current annual average extractions against long-term annual average extraction limit and compliance</p>	
<p>Rule 36 requires an assessment of current average annual extractions against the long-term annual average extraction limit in the Barwon-Darling River and for relevant groundwater sources to be undertaken from year 2 of the Plan.</p> <p>Relevantly, ‘to assess the long-term average annual modelled extractions for current conditions...the model must be set to represent as closely as possible all water use development, supply system management and other factors affecting the long-term average annual extraction volume from this water source at the time of assessment.’ (Our emphasis).¹⁹</p> <p>Rule 37 requires compliance with the long-term annual average limit on extractions to be calculated according to the formula in Rule 36 (that is, on the basis of a model that is up-to-date).</p>	<p>Rule 35 removes the requirement to ensure that the model is set to represent current levels of water use, development and supply system management and other factors affecting the long-term annual extraction volume.</p> <p>In summary, the changes mean that the modelling used to determine current annual average extractions may be based on outdated and inaccurate information. It also means assessment of compliance with the long-term annual average limit on extractions may be based on outdated and inaccurate information (see Rule 36, which concerns compliance).</p>

Part 4: Other changes under the WM Act

15. The Background Document to the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources sets out the works (that is, pumps) authorised by each *Water Act 1912* entitlement at the commencement of the Gazetted BD WSP.

¹⁷ 62(3)(m).

¹⁸ 64(1)(m).

¹⁹ 36(2)(b).

Analysis of this list indicates that the pumps linked to A Class entitlements were – with very limited exceptions - between 80mm and 150mm in diameter.²⁰ This imposed a natural limitation on the volume of water that could be extracted during A Class flow events by entitlement holders on the Barwon-Darling River.

16. Analysis of A Class licences that are currently held under the WM Act show that many of these licences are now attached to multiple 600-660mm pumps. For example, the largest A Class licence (for 4,086.50 GL) on the Barwon-Darling River is now attached to 13 pumps that are between 610mm and 660mm in diameter.²¹
17. We further note that the WM Act does not prohibit A Class water from being stored (rather than only being pumped onto crops).

Part 5: Water shepherding and amendments to enable accreditation

18. Relevantly, the Gazetted BD WSP states that it can be amended to allow for water shepherding (which, if properly implemented, would provide for event-based management of environmental flows in the Barwon-Darling River).²²
19. The Gazetted BD WSP also states that it ‘may be amended to enable a water resource plan to be accredited under the *Water Act 2007* of the Commonwealth.’
20. As the shepherding of environmental water and amendments to the BD WSP for the purposes of accreditation under the *Water Act 2007* are fundamental to the future success of water management in the Barwon-Darling and Lower Darling river systems, we can provide more detailed advice about these matters if required.

Yours sincerely,

EDO NSW

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Senior Policy and Law Reform Solicitor

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²⁰ DPI Water, *Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources - Background Document*, September 2012. Schedule 7 of this document sets out the works (that is, pumps) authorised by each *Water Act 1912* licences at commencement of the WSP.

²¹ WAL37045 attached to works approvals 85CA753627 and 85WA753315.

²² Gazetted WSP, 84(1)(c).