



EDOs of Australia

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Mr Neil Andrews
Chair
Murray Darling Basin Authority
GPO Box 1801
Canberra ACT 3701
By email: engagement@mdba.gov.au

03 November 2017

Dear Mr Andrews,

Sustainable Diversion Limit (SDL) Adjustment Mechanism

EDOs of Australia (**EDOA**) welcome the opportunity to comment on the proposed adjustments to the Basin Plan under the SDL Adjustment Mechanism (**Draft Determination**).

We are a network of independent not-for-profit community legal centres that specialise in public interest environmental law. Our clients include environmental organisations, as well as community groups, Aboriginal groups and farmers located throughout the Basin.

We have extensive experience advising on the *Water Act 2007* (**Water Act**) and Basin Plan. Our law reform and policy work includes submissions responding to the Draft Basin Plan, strategies made pursuant to the Basin Plan, and various amendments to the Water Act.¹

EDOA supports a scientifically rigorous, risk-based approach to water management that upholds the *Water Act 2007* and Basin Plan and implements Australia's international legal obligations, including the Convention on Biological Diversity (**CBD**) and Ramsar Convention.

Due to the high number of concurrent water law inquiries – as well as ongoing demand for legal advice in this area – our response is brief and high-level. However, we would be happy to provide further comment when more fulsome information is released, as recommended in this submission.

In summary, EDOA **does not support** the Draft Determination as it may result in breaches of the Water Act and Basin Plan. Further, we are concerned that the Commonwealth Government is rushing the approval and implementation of supply measure projects without fully understanding the risks associated with these projects – which in some instances may be irreversible. Our specific concerns and objections are outlined in the following seven sections:

1. Public consultation process
2. Notification of efficiency works
3. Five percent limits of change rule
4. Climate change
5. Coorong, Lower Lakes and Murray Mouth
6. Environmental and third party risk
7. Determining adjustment volume

¹ Our submissions are available online at: <http://www.edo.org.au/water1>

1. Public consultation process

The proposed supply measures will increase long-term diversions by 605GL, involve a high level of uncertainty and in certain instances will require the installation of infrastructure works in sensitive environments. In other words, the Draft Determination – if approved by Parliament – will result in lasting, significant changes to Australia’s most productive river system. On this basis, the MDBA should ensure that the community is provided with the necessary information and time to properly understand and comment on the proposed measures.

It is therefore deeply concerning that the Murray-Darling Basin Authority (**MDBA**) has not only failed to publish full business cases for each of the proposed 37 supply measures, but allowed only four weeks for the community to comment on the materials provided.

In his recently released Interim Report, Mr Ken Matthews AO concluded that a lack of transparency and expedient work practices undermined the overall integrity of water management systems in NSW.² It is therefore clear that the MDBA needs to lead by example and undertake genuine community consultation, which necessarily involves full disclosure of all business cases. Until this occurs, the community – including water users, Aboriginal groups and environmental groups - will continue to have little confidence in the integrity of the adjustment mechanism process.

We **recommend** that the Draft Determination is withdrawn, reconsidered and re-exhibited with additional information, as recommended below.

2. Notification of efficiency works

The MDBA has provided generic information regarding two general categories of proposed efficiency works, stating that they affect all SDL resource units.³ EDOA is of the view that this does not meet the requirements of the Basin Plan, particularly as it not plausible that as-yet unspecified works will affect all resource units.⁴

We **recommend** that the MDBA release specific information regarding proposed efficiency works for public consultation before any adjustment occurs.⁵

3. Five percent limits of change rule

As noted above, the MDBA has not specified the efficiency works⁶ (beyond two generic categories) or the volume of ‘up-water’ that will contribute to the 2017 SDL adjustment. It is therefore unclear how the MDBA proposes to meet the ‘five percent limits of change rule’ specified in the Water Act and Basin Plan for the proposed 2017 adjustment.⁷ We make this comment on the basis that first, the Draft Determination is for 605GL of ‘down-water’⁸ and second, it does not appear that any *specific* efficiency measures for the 2017 adjustment were notified by 30 June 2017, as required under the Basin Plan.⁹

² Ken Matthews, *Independent investigation into NSW water management and compliance - Interim report*, pp. 4, 33.

³ SDL resource units are broadly consistent with catchments.

⁴ Basin Plan, cl. 7.12, 7.13.

⁵ We note that efficiency measures notified after 30 June 2017 can only count toward the 2024 reconciliation: cl. 7.12(2).

⁶ Beyond two generic categories.

⁷ Water Act, s. 23A; Basin Plan cl. 7.19, 7.20(4)(a),(b).

⁸ This exceeds the five percent limits of change rule.

⁹ Basin Plan, cl. 7.12(1A), (2) (to be read in conjunction with cl. 7.10 and 7.11). These measures are required to bring the 605GL within the five percent limits of change.

We **recommend** that the MDBA provide further information explaining how the Draft Determination will meet the five percent limits of change rule.

4. Climate change

The information for each of the 37 proposed supply measures does not include an analysis of the likely impacts of climate change on their operation (and subsequent impacts on the environment and entitlement holders). This is a significant oversight given likely reductions in rainfall and inflows across parts of the Southern Basin.¹⁰

We **recommend** that the MDBA provide further information explaining the impact of future, likely climate change¹¹ on the operation of the 37 supply measures (and subsequent impacts on the environment and entitlement holders).

5. Coorong, Lower Lakes and Murray Mouth (CLLMM)

EDO is concerned that the materials on exhibition do not include an assessment of the cumulative impacts associated with the proposed supply measures, particularly on the internationally listed CLLMM. It is therefore unclear whether the proposed package of measures will result in breaches of Australia's international obligations.

We **recommend** that the MDBA clarify the cumulative impacts of the proposed supply measures on the CLLMM.

6. Environmental and third party risk

The materials on exhibition do not include a risk assessment for each of the 37 proposed supply measures. This is a considerable oversight given the possible scale of impacts on the environment and third parties.

We **recommend** that more fulsome information is publically exhibited including the necessary risk assessment.

7. Determining adjustment volume

EDO is concerned that certain proposed supply measures will make it difficult to comply with the provision in the Basin Plan regarding supply measure contributions and/or will not be calculated in accordance with the prescribed method.¹²

We **recommend** that the MDBA clarify how the proposed supply measures will comply with the requirements of cl. 7.15 of the Basin Plan.

Concluding remarks

As noted above, EDO supports a scientifically rigorous, risk-based approach to water management that upholds the Water Act and Basin Plan, and which implements Australia's international legal obligations.

However, we are concerned that the adjustment mechanism process is being rushed, thereby exposing the environment, entitlement holders and broader community to unnecessary risk.

¹⁰ See for example: Productivity Commission, *National Water Reform, Draft Report: Overview and Draft Recommendations*, 2017, p. 12.


¹¹ Based on best-available modelling for an appropriate range of climate scenarios.

¹² Basin Plan, cl. 7.15.

Significantly more information is required to make an informed decision regarding the overall impact and legality of the Draft Determination.

Please do not hesitate to contact us if you have any further inquiries about this submission.

Kind regards,

A handwritten signature in blue ink, appearing to read "Emma Carmody". The signature is fluid and cursive, with a long horizontal stroke at the end.

Dr Emma Carmody
Policy and Law Reform Solicitor