australian network of environmental defender's offices

Submission on the *Water Bill 2007*

10 August 2007

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Introduction

1. The Australian Network of Environment Defenders Office's welcomes the opportunity to make a submission regarding the Water Bill 2007. This submission has been prepared at very short notice and it has not been possible to consider the Bill in sufficient detail.

2. We adopt and endorse the submissions to be made by the Australian Conservation Foundation and the Inland Rivers Network.

3. Our submission commences with some comments regarding the process that has lead to the Water Bill and recommendations for a further more consultative process with the objective of reaching an enduring and sustainable legal and institutional framework for the management of Basin resources. Our submission then makes suggestions for amendments to elements of the Bill that we consider will be critical to meeting its objective of protecting and restoring the Basin.

The process so far and the need for a further *public* process

4. The Water Bill represents the most significant legislative intervention in the Murray Darling Basin ever. The Bill is of major significance to the environment of the Basin and will have a significant impact on Basin communities and all Australians. It raises significant and complex constitutional issues which go to the heart of our Federal system and have never been effectively resolved.

5. We welcome the recognition of the need for urgent action in face the continuing decline of the Basin environment and also the recognition that significant change to the legislative institutional framework for management of the Basin is required. However we deplore the haste with which this Bill is being dealt with, the absence of an adequate opportunity to prepare a comprehensive submission for the Committee, and the general lack of open consultation regarding the Bill since the Prime Minister announced the National Plan for Water Security in January 2007.

6. If the Water Bill is passed, the task of creating a legal and institutional framework for returning and maintaining the Basin to environmental sustainability will only be half done. Key elements of the National Plan for Water Security will not be implemented. The referral of powers by the States that is probably necessary for a comprehensive and effective regime continues to be controversial. Even with a referral of powers

continued cooperation of all Basin States and State based agencies will be critical to the future of the Basin.

7. Similarly, addressing overallocation is fundamental to the continued health and survival of Basin wetlands. It is not clear, however, that the voluntary buy back of entitlements and the proposed investments in on farm and off farm infrastructure proposed in the National Plan for Water Security will be effective in resolving these issues.

8. Resolving these outstanding issues is critical to the environmental sustainability of the Basin but will not be resolved with the passage of the Water Bill. We submit that the Committee should strongly recommend that a public inquiry be established to enable full and effective public participation in developing a solution to these issues.

Comments on specific aspects of the Bill

9. We welcome and strongly endorse recognition in the Bill that the legislation and the Basin plan should not only be consistent with Australia's international obligations but should give effect to them. A thorough implementation of Australia's commitments to wetlands and biodiversity under the Ramsar Convention and the Convention on Biodiversity would go a long way to meeting the Bill's objectives of protecting and restoring the Basin's ecosystems. There are, however, a number of areas in which the Bill needs to be improved to ensure that these important objectives can be fully met.

The independence of the Murray Darling Basin Authority

10. An independent, expert based Murray Darling Basin Authority (MDBA) is essential to the development, implementation and enforcement of the strategic planning regime introduced by the Bill. While the Authority should be accountable for its actions, it should also be free to the greatest extent possible from Ministerial intervention. The prospect of Ministerial intervention, even if it is rarely exercised, may inhibit the MDBA from making the difficult decisions required of it. It will also lead to an expectation amongst interest groups that powers of Ministerial intervention will be utilised, leading to a politicisation of the Basin Planning process.

11. As it is presently framed there are a number of ways in which the authority and independence of the MDBA could be undermined:

a. Clause 175 provides that subject to some limited exclusions, the Minister may give directions to the MDBA about the performance of the Authority's functions.

b. The Minister can direct the MDBA to make changes to the Basin Plan (clause 44(3)(ii)).

c. Clause 38 allows regulations to be made which exempt activities from the Basin Plan. A similar regulation making power (clause 62) operates with respect to water resource plans.

12. Although the exercise of the powers of Ministerial intervention and the regulation making powers are subject to various limitations and checks and balances, we submit that any provision that potentially compromises the MDBA's independence and authority needs careful consideration by the Committee.

13. Our specific recommendations are:

a. Amend clause 175 to make it clear that it does not cover Ministerial directions with respect to the contents of the Basin Plan (this covered by clause 44).

b. Qualify the ability of the Minister to direct the MDBA in the exercise of its functions contained in clause 175 by providing that this power must not be exercised in a manner that is inconsistent with the objectives of the Act including the objective of giving effect to relevant international agreements.

c. Remove the ability of the Minister to direct the MDBA to make changes to the Basin Plan (Clause 44(3)(ii). If this power is to remain in some form, clause 44(3)(5)(b)(i) should be amended to include items 6, 9 and 10 in the list of items excluded from Ministerial direction in all circumstances. (Clause 6, 9 and 10 cover the long term average sustainable diversion limit, the environmental watering plan and the water quality and salinity plan respectively).

d. Delete clauses 38 and 62 to remove the power to create exceptions to the Basin plan by regulation or, if these powers need to remain, restrict the powers to a defined list of circumstances.

Lack of coordination between the Basin Plan and investment under the National Plan for Water Security

14. On 12 June 2007, the Minister for Environment and Water responded to a letter from ACF questioning the relative priorities for investment in irrigation infrastructure versus entitlement buybacks as follows:

    The Plan is an integrated package and will involve simultaneous roll-out of the Modernising Irrigation and Over-allocation elements. Timelines and targets to address over-allocation will be established in a Basin Plan. Entitlement purchase will be an important part, but targeting of purchases needs to be informed by the Basin Plan – to understand the levels of over-use and over-allocation in the MDB. Modernising of irrigation infrastructure will also help address over-allocation issues across the MDB.

15. The recognition in this letter of the need for investment to be informed by the Basin Plan is not evidenced in the Bill.

16. The National Plan for Water Security proposes the investment of $6 billion in modernising on-farm and off-farm irrigation infrastructure and in $3 billion addressing overallocation. Improvement of Basin governance arrangements and an effective basin plan require coordination of the proposed investment and planning functions.

17. Without a legislative framework, decisions on expenditure have the potential to preempt and undermine the planning framework contained in the proposed legislation.

18. There Bill should be amended to include a mechanism for coordinating investment with the Basin for the purposes of:
    a. ensuring the consistency of these investment decisions with the Basin Plan;
    b. ensuring consistency with National Water Initiative commitments, giving effect to the principles of full-cost recovery, user pays and pricing transparency;
    c. transparency and accountability in the expenditure of funds;
    d. monitoring and measurement of the effectiveness of investment decisions in meeting the objectives of the Basin Plan; and
    e. assessing the cost effectiveness of investment proposals including on farm and off farm irrigation infrastructure upgrades, major engineering works and the purchase of allocations.

Improving integration with the Environment Protection and Biodiversity Conservation Act 1999

19. The Bill could be improved by better coordination and integration with the implementation of international agreements under the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) without limiting the Bills general scheme of giving effect to relevant international agreements.

20. The Bill should be amended to ensure that the Basin planning regime is not only gives effect to the international agreements relevant to Basin water resources, but that it is also consistent with and capable of giving effect to the plans and strategies developed for implementing those commitments under the EPBC Act.

21. Where applicable, the planning regime should also ensure that Water Resource Plans implement Ramsar management plans or recovery and threat abatement plans developed by a State or Territory threatened species and communities that are part of water dependant ecosystems in the MDB.

22. The Act should require the Basin Plan (including any environmental watering plan and salinity management plan included in the Basin Plan) and any Water Resource Plan to be consistent with *and give effect to* the following to the extent to which they are relevant to the management of Basin water resources:

    a. the Australian Ramsar Management Principles (see section 335 of the EPBC Act 1999);

    b. any management plan for a Ramsar wetland under section 328 of the EPBC Act (only applies to Ramsar wetlands on Commonwealth lands) or a management plan prepared by or in cooperation with a State or Territory (all MDB Ramsar wetlands):

    c. any recovery plan or threat abatement plan prepared by the Commonwealth under Chapter 5 of the EPBC Act 1999 or any recovery plan or threat abatement plan developed by a State or Territory; and

    d. the China Australia and Japan Australia Migratory Bird Agreements and any wildlife conservation plan under section 285 of the EPBC

Act. (Note that the Korea Australia Migratory Birds Agreement which the Water Bill is partly based upon to is not presently implemented under the EPBC Act and it would be useful for the Committee to recommend that this occur).

23. These amendments could be achieved by suitable amendments to clause 21 of the Bill which covers the general basis of the Basin Plan.

Implementing and giving effect to the Climate Change Convention

24. The United Nations Framework Convention on Climate Change is included in the list of international agreements implemented by the Bill. We welcome this inclusion, particularly given the significance of climate change as an issue for the Basin environment and Basin communities.

25. The Bill, however, is silent as to how the Basin plan ought to give effect to the Climate Change Convention. In comparison, subclauses 21(2) and 21(3) pick up specific parts of the Biodiversity Convention and the Ramsar Convention respectively.

26. We recommend that the Bill be amended to specifically implement the important and relevant elements of the Climate Change Convention. Examples include:

    a. Article 3(3) – parties should "take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse affects".

    b. Article 4(1)(d) – sustainable management, conservation and enhancement of sinks and reservoirs of all greenhouse gases "including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems".

    c. Article 4(1)(e) – adaptation to the impacts of climate change including appropriate and integrated plans for water resources and agriculture.

Removing restrictions on the Commonwealth Environmental Water Holder

27. State laws such as the Victorian *Water Act 1989* limit the ability of "non-water users" from holding water access entitlements. These limits and together with limits on the use of water on land that a person does not

own potentially restrict the capacity of the Commonwealth Environmental Water (CEWH) to both hold and use water access entitlements.

28. The intention of these limitations is to manage the potential for investors in water access rights who are not also land holders entering the water market. The policy rationale for this limitation (excluding water speculators) does not apply to the CEWH.

29. Clause 110 addresses the limitation on the *use* of water by providing that State laws that would prevent the CEWH from using water on land that it does not own do not apply in relation to the watering of Ramsar Wetlands or water dependant ecosystems that support listed threatened species, communities or migratory species.

30. Clause 110 needs to be amended to clarify that State laws with respect to not only the use but also the ownership or holding of water access rights are not applicable to the CEWH.

Improving accountability by including public standing provisions

31. The Bill should contain public standing provisions equivalent to those in the EPBC Act so that the Authority and the Minister can be held accountable in exercising their public interest functions under the legislation.

Judicial review of decision making

32. The Water Bill should provide that an interested person can seek a statement of reasons or judicial review of an administrative decision under the Act. Based on the existing federal legislative precedent in section 487 of the EPBC Acgt, the Water Bill should be amended to include a provision based on section 487 of the EPBC Act modified as appropriate.

33. The inclusion of extended standing provisions in the EPBC Act 1999 has not lead to a deluge of frivolous cases, and has in fact significantly contributed to the effective enforcement and implementation of the Act. It is essential for the credibility and legitimacy of the federal water regime that avenues for third party review are provided for in the legislation.

Enforcement

34. The ‘appropriate enforcement agency for contraventions’ is prescribed for contraventions of a provisions of the Act, regulations and water charging rules (clause 137). Injunctions may only be brought by the appropriate

enforcement agency (clause 140). This should be broadened, similar to section 475 of EPBC Act 1999, to provide avenues for interested parties to bring proceedings for breaches of the Act, regulation or rules.

Conclusion

35. We are grateful for the opportunity to make a submission about this important legislation, albeit subject to a grossly inadequate timeframe.

36. If the Committee requires further information or any elaboration on the matters raised in this submission we would be happy to respond.