

Thank you for the additional questions on notice emailed to us on 14 November 2012 which relate to the issue of liability for flooding on private land.

Please find attached a copy of the joint submission by EDO Victoria and Environment Victoria to the Performance Audit of Commonwealth Environmental Watering Activities which provides the actual text of the discussion around potential liabilities arising from the delivery of environmental water.

The submission discusses some of the issues with reference to experience in Victoria and suggests a range of solutions to potential liability for flooding private land. In addition to this submission, the Committee may find the discussion of the issue in the reports of the Commonwealth and Victorian water holders referenced in the report useful in its deliberations.



Submission

in response to

Performance Audit of Commonwealth Environmental Watering Activities

prepared by

Environment Defenders Office (Victoria) Ltd

and

Environment Victoria Inc

24 August 2012

About Environment Victoria Inc

Environment Victoria (EV) is the state's peak non-government, not-for-profit environment organization. EV is an organisation of environmental advocates and educators, speaking up for the environmental and helping others to do the same. EV's vision is for every Victorian to take part in safeguarding the environment and the future.

About the Environment Defenders Office (Victoria) Ltd

The Environment Defenders Office (Victoria) Ltd (EDO) is a Community Legal Centre specialising in public interest environmental law. Our mission is to support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice.

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Submitted to:

The Australian National Audit Office

environmentalwateringaudit@anao.gov.au

24 August 2012

Background

The EDO has extensive experience advising on water law and water management reform at a state and federal level. It has been involved with the development of the Water Act and the Plan for a number of years and, in conjunction with peak environment groups, reviewed and commented on the *Water Act 2007* (Cth) (**Water Act**) as it was being developed. It is well-acquainted with the operation of the Commonwealth Environmental Water Holder (**CEWH**), and actively engaged in the design and introduction of the Victorian Environmental Water Holder (**VEWH**) that was introduced in 2010.

Environment Victoria is the state's peak non-government, not-for-profit environment organization. Its Healthy Rivers Campaign is dedicated to working with government, business and communities for the restoration and protection our state's great river systems. It has been a key environmental stakeholder in the Murray-Darling since the Living Murray Initiative and has been involved throughout the development of the Water Act and the Basin Plan. It was also instrumental in the Our water Our Future reforms in Victoria, the development of the Northern Regions Sustainable Water Strategy and the creation of the Victorian Environmental Water Holder.

The Water Act establishes CEWH to manage the Commonwealth environmental water holdings on behalf of the Commonwealth, for the purpose of protecting or restoring the environmental assets of the Murray-Darling Basin, and other areas where the Commonwealth holds water, so as to give effect to the relevant international environmental agreements that Australia has ratified.¹ Notably, it must do so in accordance with the Environmental Watering Plan for the Murray-Darling Basin, and any operating rules made by the Minister under the Water Act. To satisfy those requirements, CEWH has developed a *Framework for Determining Commonwealth Environmental Water Use*.²

Limitation – Liability for Private Flooding

One of the limitations that we have encountered in the CEWH's administration of environmental watering activities is the need to avoid causing adverse impacts on third parties.

Although CEWH is the legal holder of Commonwealth Environmental Water and is responsible for its management, it does not have the means to deliver water back to the environment by itself. It relies on the cooperation of delivery partners who operate the infrastructure (dams, weirs, etc) required to store and move water in a regulated system. In Victoria, the key operational delivery partners are the Rural Water Authorities and Catchment Management Authorities.³

Delivery partners are constrained in their ability to release and distribute environmental water by their legal obligations not to cause damage to third parties. They could be held liable under the private flooding provisions of the *Water Act 1989* (Vic),⁴ or under the common law of nuisance or negligence, for causing water to flow onto private property in a way that causes personal injury, property damage or economic loss. Similar barriers are being experienced in other Basin states, for example watering in the Murrumbidgee.

¹ *Water Act 2007* (Cth) s 105.

² CEWH, *A Framework for Determining Commonwealth Environmental Water Use*, December 2011, available here: <http://www.environment.gov.au/ewater/publications/cewh-framework.html>.

³ Commonwealth Government, *Delivery Partners*, 24 August 2012, <http://www.environment.gov.au/ewater/partners/index.html>.

⁴ *Water Act 1989* (Vic) s 16.

These legal barriers can limit delivery partners in conducting environmental watering, in some cases causing them to refrain from watering private land unless the land is covered by a conservation covenant.⁵ In a recent report, CEWH acknowledged that this risk to private land and infrastructure has posed an obstacle to the delivery of Commonwealth Environmental Water in the past.⁶

This year, CEWH has allocated around 300GL for watering in the Goulburn catchment in northern Victoria. Despite this being a sizeable volume, the delivery partners (VEWH and Goulburn Broken CMA) have not set any objectives for bankfull or overbank flows in 2012/13⁷. One of the reasons given by VEWH is that there have been recent high and overbank flows. This seems to be in direct conflict with the CEWH's stated objective for wet and very wet years is to 'contribute to the expansion of areas of healthy ecosystem' and 'increasing the frequency, volume, duration and floodplain extent of floodplain events'.⁸

A further reason given by VEWH for not setting bankfull or overbank flows in the Goulburn is 'the feasibility of delivering overbank flow recommendations, including how best to deliver or supplement flows while avoiding damage to public and private assets requires further investigation Therefore overbank flows will only occur naturally'.⁹ The same constraint applies in all the other Victorian catchments in which the VEWH holds water and the only area where significant out of channel releases are planned is in Gunbower Forest which is public land.

The constraints management strategy proposed in the revised draft Basin Plan will help identify and categorise constraints on the delivery of environmental water¹⁰. However removing or remedying constraints is the responsibility of state governments and there is a danger that by placing responsibility for the strategy in the hands of the MDBA there will be a lack of incentive for states to take any action. The strategy will need incentives, a budget and a prioritisation process to drive effective action to relax or remove constraints that affect the delivery of environmental water.

Another possible solution to this legal problem is to enter into flood easements with private landholders in the Murray-Darling Basin. We understand that the Australian Floodplain Association has already been doing this, and that farmers with almost 400,000 hectares of land have now signed up to 'flood easements' granting the government a right to water their land and indemnifying them from liability.¹¹ The development of this sort of 'standing register' of land which can be flooded for environmental purposes might benefit from more government support.

Delivery partners might also benefit from some Commonwealth Government or CEWH-supported legal capacity-building, designed to inform them of these problems and solutions, and to minimise the barriers that they pose to the delivery of Commonwealth Environmental Water. Catchment Management Authorities, for example, are likely to appreciate some legal information and assistance that would help them overcome these obstacles as quickly and carefully as possible.

⁵ Environment Defenders Office (Victoria) Ltd, *Survey of Victorian Catchment Management Authorities*, 2011.

⁶ CEWH, *Murray-Darling Basin Environmental Water Holders Report June 2012*, available here: <http://www.environment.gov.au/ewater/publications/mdb-environmental-water-holders-report-2012.html>.

⁷ Victorian Environmental Water Holder (2012) Seasonal Watering Plan 2012/13.

⁸ CEWH, *A Framework for Determining Commonwealth Environmental Water Use*, December 2011, p9.

⁹ Victorian Environmental Water Holder (2012) Seasonal Watering Plan 2012/13, p123.

¹⁰ Proposed Basin Plan (August 2012 revision) s6.07.

¹¹ David Wroe, 'Flood our land: Graziers offer to help rivers' health', *The Sydney Morning Herald* (Sydney), 23 December 2011, <http://www.smh.com.au/environment/water-issues/flood-our-land-graziers-offer-to-help-rivers-health-20111222-1p77n.html>.

Recommendations

- The constraints management strategy to be developed by MDBA should include incentives, a budget and a prioritisation process to drive effective action to relax or remove constraints that affect the delivery of environmental water.
- SEWPAC should provide support (financial and otherwise) to privately led efforts to sign landholders up to 'flood easements', allowing the government to water their land and indemnifying them from liability for doing so.
- SEWPAC should support and/or directly provide legal information, assistance and capacity-building to CEWH delivery partners, to help them understand and overcome these legal barriers to environmental watering as quickly and accurately as possible.

Limited – the scope of CHEW

According to a recent environmental water holders' report, 92.4% of environmental water in the Murray-Darling Basin is planned environmental water (water set aside for the environment through water plans and rules on consumptive entitlements) or above cap water¹². The delivery of this planned environmental water has had little to no oversight or accountability, and it has been qualified, not delivered or delivered for a non-environmental purposes in the past¹³.

EDO and Environment Victoria have previously suggested that the VEWH have oversight of all categories of environmental water in Victoria, not just held environmental water.¹⁴ We make the same recommendation with regard to the CEWH - that it should have a real-time monitoring and oversight role over planned environmental water across the MDB. The CEWH should be able to review planned environmental water rules in each State and report on the delivery of planned environmental water. The environmental watering plan (EWP) in the Basin Plan covers both held environmental water and planned environmental water and extending the role of the CEWH in this way would greatly improve the use and accountability of planned environmental water. There is nothing in the Water Act that would restrain the implementation of this.

Recommendation

- The CHEW should have a formal role in oversight and monitoring of planned environmental water across the MDB, as well as held water.

¹² CEWH, *Murray-Darling Basin Environmental Water Holders Report June 2012*.

¹³ See Environment Defenders Office (Victoria) Inc, *Reforming the Environmental Water Reserve - How amendments to Victoria's Water Act could restore river health* (May 2012), available here: <http://www.edovic.org.au/law-reform/major-reports/reforming-environmental-water-reserve>.

¹⁴ Environment Defenders Office (Victoria) Inc, *Reforming the Environmental Water Reserve - How amendments to Victoria's Water Act could restore river health* (May 2012), available here: <http://www.edovic.org.au/law-reform/major-reports/reforming-environmental-water-reserve>.