

Our Ref: PH:JZ:1197204

13 October 2023

By Email Only

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Dear Claire

Implications of proposed amendments to the Water Act 2007 and the Basin Plan 2012

- 1.1 We have been asked to provide a legal advice on the impact of the *Water Amendment (Restoring Our Rivers) Bill 2023 (Bill)* on the *Water Act 2007 (Water Act)* and the Basin Plan 2012.
- 1.2 This advice is limited to surface water.
2. **Legislative Background**
 - 2.1 Key concepts under the Water Act are:
 - (a) "baseline diversion limit" (**BDL**) which are estimates of how much water was used in the Basin prior to the Basin Plan. The initial whole of Basin BDL was 13,623 GL / year; and
 - (b) "long-term average sustainable diversion limit" (**SDL**) which reflects an environmentally sustainable level of take of water.¹ The initial whole of Basin SDL was 10,873 GL / year.
 - 2.2 The difference between the initial BDL and SDL is 2,750 GL / year. This has been the recovery target in the Basin Plan 2012.
 - 2.3 One mechanism to "bridge the gap" between the BDL and SDL, is to increase the SDL by increasing the supply of water available to be taken (**supply measures**). Increasing the SDL, results in a corresponding reduction in the recovery target.

Adelaide
Brisbane
Canberra
Darwin
Hobart
Melbourne
Norwest
Perth
Sydney

¹ Water Act 2007, section 23.

Presently, the Basin States have proposed supply measures which could provide 605 GL / year.

- 2.4 In addition to the 2,750 GL recovery target, one of the objectives pursued by the Commonwealth is to increase the volume of water resources available for environmental use by 450 GL / year.² That is, the 450 GL of additional environmental water is separate to and above the 2,750 GL recovery target.
- 2.5 Under the Basin Plan, the 450 GL of additional environmental water is to be recovered through "additional efficiency measures" (**efficiency measures**).³ Efficiency measures result in less water being consumed and decrease the SDL.⁴
- 2.6 Where there is a decrease in the SDL, there is a corresponding increase in the recovery target. Put another way, and subject to the constraints discussed below, the 450 GL of additional environmental water would effectively decrease the SDL by 450 GL / year (to 10,423 GL / year) and increase the recovery target (to 3,200 GL / year).
- 2.7 The SDL can only be adjusted (without an adjustment to the Basin Plan 2012) by the "sustainable diversion limit adjustment mechanism" (**SDLAM**). The SDLAM process includes notification, public consultation, and allows the Senate to disallow any proposed adjustment.
- 2.8 Presently, there exist the following constraints to adjusting the SDL. These include:
 - (a) any adjustment to the SDL cannot exceed $\pm 5\%$ of the SDL (currently, the SDL as at 2012).⁵ Five percent of the SDL is 543 GL. Accordingly, taken together, the supply measures and the efficiency measures cannot increase the SDL above 11,416 GL, and cannot decrease the SDL below 10,330 GL;
 - (b) there is a 1,500 GL cap on surface water purchasing.⁶ This was legislated in 2015.⁷ The cap was designed to shift the focus away from the acquisition of water towards investment in on-farm infrastructure and efficiency measures.⁸ As at September 2023 the Commonwealth can purchase another 270 GL before the cap is reached;⁹ and
 - (c) efficiency measures, which go towards both driving down the SDL and achieving the 450 GL of additional environmental water, were required to achieve neutral or improved socio-economic outcomes compared with the outcomes under benchmark conditions.¹⁰ Currently, there are very limited circumstances in which the Water for the Environment Special Account (**WESA**) can be used to purchase additional environmental water.¹¹ Rather, these funds are primarily to be directed efficiency measures.

² Basin Plan 2012, clause 7.09(e).

³ Basin Plan 2012, clause 7.09(e) and Schedule 5.

⁴ Basin Plan 2012, clause 7.04.

⁵ Water Act 2007, section 23A(4).

⁶ Water Act 2007, section 85B(1).

⁷ *Water Amendment Act 2015*.

⁸ Second Reading Speech for the *Water Amendment Act 2015*.

⁹ Second Reading Speech for the *Water Amendment (Restoring our Rivers) Bill 2023*.

¹⁰ Basin Plan, clause 7.17(2)(b).

¹¹ Water Act 2007, section 86AD.

3. What are the major amendments to the Water Act proposed by the Bill?

3.1 The Bill proposes to extend the time to the Basin States to deliver the 605 GL / year of supply measures, and also extends the time for the Commonwealth to deliver efficiency measures and purchase additional held environmental water (**HEW**) entitlements, until 31 December 2026.¹²

3.2 In addition, the Bill proposes:

- (a) to remove the 1,500 GL cap on surface water purchasing;¹³
- (b) to broaden the circumstances in which the WESA can be used to purchase water. Materially, it proposes to allow the WESA to be used to purchase additional HEW entitlements (which are to be counted as additional environmental water);¹⁴ and
- (c) to amend the SDLAM so that additional HEW entitlements cause an adjustment (decrease) to the SDL.¹⁵

4. How does the Bill impact on the operation of the SDLAM?

4.1 The Bill proposes to:

- (a) allow the Minister to acquire from time to time additional HEW entitlements. These additional HEW entitlements do not have to be notified in accordance with the processes set out in cl 7.12 of the Basin Plan;¹⁶ and
- (b) cause the SDL to be adjusted (downwards) upon specification by the Minister.¹⁷ to reflect the effects of additional HEW entitlements ()

4.2 Specification of additional HEW entitlements will decrease the SDL (and increase the recovery target) by the quantity of water that is registered.

4.3 The Water Resource Plans prepared by the States are required to incorporate and apply the SDL, including any adjusted SDL.¹⁸

4.4 Once Water Resource Plans are accredited, reductions in the SDL to account for additional HEW entitlements specified by the Minister will have to be accounted for by Basin States in their Water Resource Plans.

5. What are the implications for the SDL?

5.1 The changes in the Bill bypass the existing safeguards (outline above at [2.7]) that operate under the SDLAM.

¹² Bill, proposed clause 7.11(1) of the Basin Plan.

¹³ Bill, proposed deletion of section 85C.

¹⁴ Bill, proposed section 86AD.

¹⁵ Bill, proposed section 23B(8) and proposed clause 7.11 of the Basin Plan.

¹⁶ Bill, proposed section 23B(8) and proposed clause 7.11 of the Basin Plan.

¹⁷ Water Act 2007, section 23B; Basin Plan 2012, clause 7.09(ab).

¹⁸ Water Act 2007, section 22(3)(b).

5.2 The notification of additional HEW entitlements will automatically flow through to the SDL in the Basin Plan and from there onto the accredited Water Resource Plans.

5.3 This allows for a more dynamic system, that is capable of faster changes than the processes that existed prior to the Bill.

6. Does the Bill enshrine 450 GL as a mandatory water recovery target?

6.1 Presently, the 450 GL for additional environmental water is not a mandatory water recovery target. The Bill does not propose any change to this.

6.2 Rather 450 GL for additional environmental water is an object of the WESA.¹⁹ That is, a purpose of the WESA is to "protect[] and restor[e] the environmental assets of the Murray-Darling Basin",²⁰ and one way this is to be achieved is through increasing the volume of water available for environmental use by 450 GL / year.

6.3 The consequence of the Bill is that the WESA will not be limited to being spent of efficiency measures, but can now be spent directly to acquire water.

7. What happens if the Government runs out of willing participants?

7.1 Presently, and this position is not changed by the Bill, the 450 GL for additional environmental water is not a mandatory water recovery target, rather it is an objective of the WESA.

7.2 Were there to be no willing participants, which we take to mean no further willing participants to undertake efficiency measures, nor water to be acquired as an additional HEW entitlement (assuming the Bill is passed), then the money in the WESA would be held until such time as there were willing participants or other efficiency projects could be pursued.

7.3 The Bill also allows for the extension of the time for surplus funds in the WESA to be used.²¹

8. How does the Bill impact on the neutral or improved socio-economic outcomes requirement?

8.1 The Bill removes the 1,500 GL cap on water purchases and expands the circumstances in which the WESA can be used to acquire water to include acquisition for the purpose of additional HEW entitlements (ie additional environmental water).

8.2 The Bill proposes a limited number of matters which must be considered before an additional HEW entitlement can be purchased.²²

8.3 However, unlike other efficiency measures which are required to achieve neutral or improved socio-economic outcomes compared with the outcomes under benchmark

¹⁹ Water Act 2007, section 86AA(3)(b).

²⁰ Water Act 2007, section 86AA(1)(a).

²¹ Bill, proposed section 86AH.

²² Bill, proposed clause 7.08B(3) of the Basin Plan.

conditions,²³ no such requirement is proposed by the Bill to be imposed in relation to additional HEW entitlements.

8.4 Furthermore, the effect of the Bill will be that socio-economic matters do not have to be considered before the SDL is adjusted (decreased) to take into account any additional HEW entitlement.

9. Does the Bill allow other options, other than buybacks, to make up the 450 GL of additional environmental water?

9.1 As noted, the Bill proposes to allow, for the first time, the WESA to be used to fund buybacks for the purpose of achieving the 450 GL for additional environmental water.

9.2 The Bill potentially also widens the efficiency measures which may be funded by the WESA by dint of loosening the restrictions on projects that may be funded.²⁴

9.3 The effect of this is that the WESA would be able to be used to do either or both of the following: fund efficiency measures or fund buybacks.

9.4 The Bill does not include any preference on how the 450 GL of additional environmental water would be achieved.

10. Does the Bill conform with the agreement between the Commonwealth and the Basin States reached on 22 August 2023.

10.1 The Commonwealth and Basin States entered into the Agreement of Murray-Darling Basin Ministers to Deliver the Basin Plan in Full dated 22 August 2023 (**August 2023 Agreement**).

10.2 The Bill goes beyond what was agreed upon in the August 2023 Agreement. The Commonwealth and Basin States only agreed that amendments to the Water Act would comprise of the following:

1. The Commonwealth will use its best endeavours to amend the Commonwealth's Water Act 2007 to implement the Basin Plan in full by:

- extending time to deliver Sustainable Diversion Limit Adjustment Mechanism (SDLAM) supply and constraints projects until 31 December 2026;*
- allowing for Basin states to bring forward new supply projects provided they can be achieved by no later than 31 December 2026;*
- a reconciliation of SDLAM project outcomes by the MDBA to be completed by 31 December 2026; and*
- recovering 450 GL of water for enhanced environmental outcomes.*

²³ Basin Plan, clause 7.17(2)(b).

²⁴ Bill, proposed section 86AD(2)(a).

- 10.3 Further, the August 2023 Agreement seeks to ensure:
- (a) that the approach to achieving 450 GL of additional environmental water has regard to "minimising the socio-economic impact on communities" (point 7 of the August 2023 Agreement); and
 - (b) provides "funding for community adjustment assistance and working with Basin governments and communities in delivering this assistance" (point 9 of the August 2023 Agreement).
- 10.4 The Bill does not require that social and economic outcomes are maintained or improved when water is acquired for the purpose of additional HEW entitlements.
- 10.5 The Bill also does not require consideration of, or contain any mechanism to minimise, the socio-economic impact on communities, and also does not provide funding for community adjustment assistance.

Yours sincerely

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Legal Advice Summary

(Restoring Our Rivers) Bill 2023

NFF, NIC and NSWIC collectively sought legal advice from HWL Ebsworth Lawyers to identify the implications of the *(Restoring Our Rivers) Bill 2023*.

The findings show a significant overreach by the Federal Government, removal of checks and balances in existing processes, and disregard of formal agreements with State Governments.

Four key issues identified are:

- 1) **The Bill creates a “free-falling” SDL - by removing the checks and balances** in how SDLs are set and adjusted (the formal structures and processes), with unknown impacts. This goes beyond the SDL Adjustment Mechanism (SDLAM) agreed by the States in the 2012 Basin Plan.

HWL Ebsworth Lawyers said:

The changes in the Bill bypass the existing safeguards that operate under the SDLAM. The notification of additional HEW entitlements will automatically flow through to the SDL in the Basin Plan and from there onto the accredited Water Resource Plans. This allows for a more dynamic system, that is capable of faster changes than the processes that existed prior to the Bill.

Enabling SDLs to be varied “from time to time” increases the discretion of the Federal Minister in bypassing existing proper processes, and effectively reduces the powers of the Basin States, which then have to enforce a new unknown SDL through State instruments, potentially beyond the agreed limits of change. This undermines all water rights, including those already purchased by the State and Federal Governments.

- 2) **The Bill is about purchase, not projects, contrary to State positions** – the Federal Government claims ‘all options are on the table’ and that the Bill creates more flexibility. This is misleading: the only new option enabled by the Bill is buybacks for the 450 GL.

HWL Ebsworth Lawyers said:

The effect of this is that the WESA would be able to be used to do either or both of the following: fund efficiency measures or fund buybacks. The Bill does not include any preference on how the 450 GL of additional environmental water would be achieved.

This is despite States – including NSW and Victoria - publicly expressing opposition to buybacks. For example, NSW has indicated that “*the NSW Government does not support water purchases*” in the August 2023 Agreement and stated in its submission to the Senate Inquiry “*NSW advocates for projects rather than purchases to deliver the 450 GL*”.

- 3) **The Bill breaches the August Agreement agreed by all Basin States (excl. Victoria)**

The Federal Government has in bad faith gone beyond the parameters agreed by Basin States (excl. Victoria).

HWL Ebsworth Lawyers said:

The Bill goes beyond what was agreed upon in the August 2023 Agreement. The Commonwealth and Basin States only agreed that amendments to the Water Act would comprise of the following: [insert point 1 of August Agreement].

The Bill does not require that social and economic outcomes are maintained or improved when water is acquired for the purpose of additional HEW entitlements.

The Bill also does not require consideration of, or contain any mechanism to minimise, the socio-economic impact on communities, and also does not provide funding for community adjustment assistance.

The August 2023 Agreement was based on the premise that the approach to achieving 450 GL of additional environmental water had regard to "minimising the socio-economic impact on communities" (point 7), and provided "funding for community adjustment assistance and working with Basin governments and communities in delivering this assistance" (point 9). Neither of these are reflected in the Bill.

4) The Bill removes socio-economic protections, which were a fundamental part of the Basin Plan 2012

HWL Ebsworth Lawyers said:

... unlike other efficiency measures which are required to achieve neutral or improved socio-economic outcomes compared with the outcomes under benchmark conditions, no such requirement is proposed by the Bill to be imposed in relation to additional HEW entitlements.

Furthermore, the effect of the Bill will be that **socio-economic matters do not have to be considered before the SDL is adjusted** (decreased) to take into account any additional HEW entitlement.

The additional 450GL was always conditional on socio-economic neutrality. This Bill removes those critical original conditions, which were purposeful and had bipartisan agreement.

Further points

The Basin Plan is about moving from pre-Basin Plan diversion levels (the Baseline Diversion Limit, BDL) to the Sustainable Diversion Limit (SDL), which required direct recovery of a benchmark 2750 GL of water.

The SDL Adjustment Mechanism provided flexibility so that the volume that needed to be recovered could be reduced by up to 650 GL in supply measures below the 2750 GL benchmark, and an additional 450 GL in efficiency measures could be recovered above the benchmark, provided its recovery only had neutral or positive socio-economic impacts.

The direct recovery has been completed, based on the recovery of 2107 GL, the current SDLs now in effect, and subject to the completion of 605 GL in supply measures. It is positive to allow more time and flexibility to complete the 605 GL projects. However, the 2012 Basin Plan does not require an additional 450 GL to be recovered.

Any additional recovery should preference off-farm efficiency and complementary measures, be subject to achieving neutral or improved socio-economic outcomes, and should not automatically change (decrease) the SDLs outside the existing SDL Adjustment Mechanism process. Otherwise, allowing the WESA to fund buybacks will simply drive up the price of water for rural communities, reduce its availability and leave rural communities worse off.